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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK
Supreme Court of the United States

DONTRAY CHANEY,

Petitioner,

v.

CITY OF ORLANDO and JONATHAN CUTE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OF AN OPINION OF THE APPELLATE COURT OF THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to 28 USC § 1254, the Petitioner petitions this Court by certiorari of an unpublished decision of the Eleventh Circuit Court of Appeal which violates the precedence of this Court and Circuit Courts, including opinions of the Eleventh Circuit Court, and it also violates the Fourth and Seventh Amendments to the Constitution of the United States.

Three questions are presented:

1. Whether the Circuit Court's opinion affirming an order of a District Court granting a Rule 50(b) motion by relying upon selected jury findings while ignoring others and which weighed contradictory evidence and substituted its own view of the evidence for that of the jury in order to deny the Petitioner his Seventh Amendment right to a jury verdict is a contradiction of the law established by this Court.

2. Whether the Circuit Court's opinion affirming a District Court's order granting a Judgment Notwithstanding the Jury Verdict pursuant to Rule 50(b) denied the Petitioner due process of law when the District Court clearly ignored and failed to follow the well-recognized legal precedents of this Court and circuit courts which hold that courts have a special duty to harmonize and reconcile seemingly inconsistent interrogatory answers in a special verdict in order to uphold the

jury's verdict when possible.

3. Whether the Circuit Court's affirmance of the District Court order which granted a Rule 50(b) Motion for Judgment Notwithstanding the Jury Verdict should be reversed because the District Court relied upon the Jury's findings in reaching its decision in violation of the opinion and directions of the Circuit Court that a Court must rely on the facts and arguments which were made before the jury verdict was returned and that said facts must be viewed in favor of the prevailing party.

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case on the cover page, except that the City of Orlando is no longer a party in this case.

CORPORATE DISCLOSURE STATEMENT

Appellee knows of no corporate interest in this case.

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F. Order of the Circuit Court Denying Petitioner's Motion for Rehearing En Banc or Rehearing by the Panel dated December 31, 2008

G. Nolle Prosequi by State Attorney dated July 15, 2003

OPINION BELOW

The Appellate Court for the Eleventh Circuit reversed the District Court for the Middle District of Florida's first order granting the Defendant's Rule 50(b) Motion and instructed the District Court not to use any findings of the jury and that it must view the evidence in a light most favorable to the prevailing party (the Petitioner herein). Appendix C.

The District Court relied upon some findings of the jury while it ignored the findings of the jury which supported its verdict for the Petitioner when it granted a Rule 50(b) Motion a second time. Appendix D.

The District Court also reweighed the evidence which it believed favored the Defendant while it ignored the evidence which favored the Petitioner even though such evidence was the basis for the jury's verdict for the Petitioner (the Plaintiff below) when it granted the Defendant's Rule 50(b) Motion a second time. See Appendices A, B, C, D and E.

The Petitioner appealed the second order of the District Court to the United States Court of Appeals for the Eleventh Circuit on May 3, 2008. The Circuit Court issued an unpublished opinion on August 26, 2008 affirming the District Court's second order granting the Defendant's Rule 50(b) Motion even though the District Court failed to follow the law of the case which the Circuit Court announced in its first opinion in this case. One judge dissented.

Chaney v. Cute, 291 Fed. Appx. 238 (11th Cir. 2008). Appendix E.

The Petitioner timely filed a Motion for Rehearing and a Motion for Rehearing *En Banc* of the last Circuit Court opinion on September 12, 2008. The Circuit Court denied those motions on December 31, 2008. See Appendix F.

The Petitioner has timely filed this Petition for Writ of Certiorari of the Circuit Court's September 12, 2008 opinion which conflicts with the decisions of this Court, other circuit courts, and the law of this case which the Eleventh Circuit Court announced in its first opinion in this case. Also, the opinion violates the Petitioner's rights under the Seventh and Fourth Amendments to the Constitution.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and (2).

The Petitioner is requesting certiorari review of an opinion of the Eleventh Circuit Court of Appeal rendered on September 12, 2008 in this case. Appendix E. The Petitioner's Petition for Panel Rehearing and Petition for Rehearing *En Banc* to the Eleventh Circuit was denied on December 31, 2008 and a mandate was entered on December 31, 2008. See Appendix F.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1988(a): (a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Fourth Amendment to the Constitution of the United States: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized.

Seventh Amendment to the Constitution of the United States: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50(a) and(b), Federal Rules of Civil Procedure: Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling.

(a) **Judgment as a Matter of Law.**
1.(1) In General.

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion.
A motion for judgment as a matter of law may be made at any time before the case is submitted to the

jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

STATEMENT OF THE CASE

The U.S. District Court for the Middle District of Florida granted the Defendant's Rule 50(b) Motion for a Judgment Notwithstanding the Jury Verdict for the Petitioner. Appendices A and B. The Eleventh Circuit reversed the District Court's order and remanded the case back to the District Court with an opinion reminding the District Court of the law to be followed when considering a Motion for a Judgment Notwithstanding a Jury Verdict. See *Chaney v. City of Orlando and Cute*, 483 F.3d 1221 (11th Cir. 2007). Appendix C.

In its first opinion, the Circuit Court advised the District Court that it could not use the jury's findings in deciding a Rule 50(b) Motion. The Circuit Court further advised the District Court that all inferences in the evidence must be given to the party for whom the jury found. Appendix C.

The District Court did not follow the instructions which the Circuit Court gave it in its first opinion when it granted the Defendant's Rule 50(b) Motion a second time. Appendix D.

The Petitioner appealed the District Court's second order to the U.S. Court of Appeals for the Eleventh Circuit a second time on May 3, 2008. The Circuit Court issued an unpublished opinion on August 26, 2008 affirming the second order of the District Court. Judge Barkett dissented. Appendix E.

The Petitioner filed a petition for rehearing en banc, or for a panel rehearing based on an argument that its opinion conflicted with decisions of this Court, other circuit courts, and its first opinion published in this case. That petition was denied on December 31, 2008. Appendix F.

The Petitioner has timely filed this Petition for Writ of Certiorari.

In paragraphs 3(a) and (b), 4, 5, 7, 8, 9, and 11 of the interrogatory verdict returned by the jury, the jury found that the Defendant (a white police officer) intentionally violated the federal constitutional rights of the Plaintiff (an African-American teenager) not to be subjected to excessive or unreasonable force during an arrest by using unreasonable force in effecting the arrest, using unreasonable force when he tased the Petitioner, that the Defendant acted with malice in pursuing the traffic citation against the Petitioner, and that the Defendant's acts were the proximate or legal cause of damages sustained by the Petitioner, that the Defendant acted with reckless indifference to the Petitioner's federally protected rights and that punitive damages should be assessed against the Defendant. Appendix A.

The Defendant had stopped the vehicle the Petitioner was driving for what the Defendant claimed was an obscured tag. (This is a non-arrestable motor vehicle infraction under Florida law.) See Section 320.061, Fla. Stat. See Appendix A.

Although the hearing officer who heard the evidence regarding the tag found the tag on the car the Petitioner was driving was not obscured and he dismissed the ticket, the first interrogatory on the verdict form asked the jury **whether the Defendant reasonably believed** the tag on the vehicle the Plaintiff was driving was obstructed in violation of Florida law when he stopped the Petitioner. The jury answered "yes" to this interrogatory. Appendix A.

The Plaintiff maintains that it did not matter whether the Defendant himself believed the tag was obstructed because this was only his subjective impression and this was a non-arrestable infraction which did not permit the officer to arrest the Petitioner for such an infraction. Section 320.061, Fla. Stat.

Under Florida law, a law enforcement officer does not have probable cause to seize and arrest the driver of an automobile for resisting an officer without violence under Section 843.02, Fla. Stat. simply because the driver does not produce his driver's license to the officer as quickly as the officer believed he should have. See *Cencieus v. State*, 758 So.2d 1250 (Fla. 4th DCA 2000). See *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (which holds that a citizen has a right to say things to a law enforcement officer with which the officer may disagree without being subject to arrest for doing so). See also: *Thornton v. City of Miami*, 132 F.3d 1395 (11th Cir. 1998).

Federal courts have recognized the fact that a **traffic stop** is a seizure for Fourth Amendment purposes and **must be based on reasonable suspicion that a crime has been committed.** *Bingham v. City of Manhattan Beach*, 329 F.3d 723 (9th Cir. 2003).

In *Terry v. Ohio*, 392 U.S. 1, 21 (1968), this court said, **"It is imperative that the facts be judged against an objective standard."** (Emphasis added.) The jury applied a subjective standard when it answered yes to the first interrogatory on the verdict. It did not find that a reasonable person would have believed the tag was obscured.

The jury did not find that a reasonable law enforcement officer would have believed the Petitioner committed a crime for which the Defendant would have probable cause to arrest him. The Defendant did not have probable cause to seize and arrest the Petitioner as he did because the tag infraction was not an arrestable offense. The jury just found that the Defendant himself simply had a subjective belief that the tag was obscured.

Such a motor vehicle infraction cannot be the basis for a law enforcement officer to seize a citizen and resort to physical force in violation of the Petitioner's Fourth Amendment rights as the Defendant did to the Petitioner in this case.

The Eleventh Circuit said in *Draper v. Reynolds*, 369 F.3d 1270, 1276 (11th Cir. 2004) **"probable cause exists when the facts and circumstances within the officer's knowledge could cause a prudent person to believe under the circumstances shown, that the suspect had committed, is committing, or is about to commit an offense."** (Emphasis added.) Considering the fact that the information the Defendant had about the Petitioner would not have given a prudent person reason to believe that the Petitioner committed a crime before the Defendant seized the Petitioner the Defendant did not have probable cause to arrest the petitioner and the excessive force he used violated the Petitioner's constitutional rights which cannot be shielded by qualified immunity.

The second interrogatory on the verdict asked the jury whether the Defendant reasonably believed the Petitioner resisted the Defendant's lawful directions or attempted arrest. The jury answered "yes" to this interrogatory. Appendix A.

Here, again, the jury did not find that a reasonable law enforcement officer would have believed under the facts as they existed that the Petitioner resisted his lawful directives or attempted arrest; it only found that the Defendant had such a belief.

The Defendant charged the Plaintiff with resisting an officer without violence; however, that charge was nolle prosequied by the State Attorney.

Appendix G.

This Court said in *Graham v. Connor*, 490 U.S. 386, 397 (1989) that **"The question is whether the officer's actions are *objectively* reasonable in light of the facts and circumstances confronting (him), without regard to his underlying intent or motivation."** (Emphasis added.)

In *United States v. Floyd*, 281 F.3d 1346, 1348 (11th Cir. 2002), the Eleventh Circuit said **"a law enforcement officer must have facts and circumstances within his knowledge sufficient to warrant a reasonable belief that the suspect has committed or was committing a crime before he has the authority to seize that person."**

The Eleventh Circuit said in *Crosby v. Monroe County*, 394 F.3d 1328, 1332 (11th Cir. 2004), **"For an officer to have probable cause to justify an arrest for a particular crime, it is necessary for the elements of the crime to be present."** (Emphasis added.) When the Defendant yanked the Petitioner out of the car he did not have probable cause to believe the Petitioner had committed a crime for which he could be arrested and prosecuted. He certainly had no grounds to violently mistreat the Petitioner as he did.

Under Florida law, **a law enforcement officer is only justified in using that amount of force which is reasonably necessary to defend himself from bodily harm while making an arrest.** Section

776.05, Fla. Stat. See also *M.J.R., a child v. State*, 715 So.2d 1103 (Fla. 5th DCA 1998).

There was no evidence in the instant case that the Petitioner did anything which would cause a reasonable person to believe the Defendant would have to defend himself from the Petitioner before the Defendant seized the Petitioner. Clearly the jury made no such finding.

Under Florida law a law enforcement officer does not have the authority to arrest a person for resisting arrest without violence unless he is in the act of lawfully performing a legal duty and there are grounds for an arrest. Section 843.02, Fla. Stat. See also *Jay v. State*, 731 So.2d 774 (Fla. 4th DCA 1999).

The Florida Stop and Frisk law states that an **officer must be encountering a person under circumstances which reasonably indicate that the person he is confronting has committed, is committing, or is about to commit a violation of the criminal law of the state and only then may the law enforcement officer detain such person *for the purpose of ascertaining his identity.*** Section 901.151, Fla. Stat.

An officer is not justified in using force on a person if the arrest is unlawful or if he should have known it was unlawful. Section 776.05(2), Fla. Stat.; *Marley v. State*, 362 So.2d 1013 (Fla. 1978). Clearly, circumstances did not exist at the time the Defendant seized the Petitioner in the instant case which would

permit him to act under Florida law in such an unreasonable manner as he acted on this occasion.

And, Section 776.05, Fla. Stat. states that a **law enforcement officer may only use that amount of force that is reasonably necessary to defend himself from bodily harm while making an arrest or when retaking a felon fleeing from justice.** No such facts existed in this case.

According to the Eleventh Circuit in *Davis v. Williams*, 451 F. 3d 759, 764 (11th Cir. 2006), a law enforcement officer must be engaged in the lawful execution of a legal duty and **the facts must show that the action of the (suspect) constituted an obstruction or resistance of that lawful duty. A law enforcement officer cannot claim qualified immunity when his actions were based on his own subjective reactions to the citizen,** the Eleventh Circuit said in *Skop v. City of Atlanta, Ga.*, 485F.3d 1130 (11th Cir. 2007).

The Florida Supreme Court has said that a law enforcement officer in Florida is not authorized to arrest a citizen for resisting and obstructing him until it is obvious that the officer is lawfully executing a legal duty under Section 843.02, Fla. Stat. *Tillman v. State*, 934 So.2d 1263 (Fla 2006).

Under Florida law a person may resist a law enforcement officer without violence when the arrest is not lawful. *Lee v. State*, 368 So.2d 395, 396 (Fla. 3d DCA 1979) and *K.Y.E. v. State*, 557 So.2d 956, 957

(Fla. 1st DCA 1990).

An unlawful arrest is a seizure under the Fourth Amendment. *California v. Hodari D*, 499 U.S. 621, 624 (U.S. 1991).

Plainly, under the evidence presented during the trial, the Defendant's claim that the Petitioner resisted him without violence did not occur before he seized the Petitioner. The Petitioner's right to be free from an unreasonable search and seizure under the Fourth Amendment to the United States Constitution was violated by the Defendant seizing him before there was probable cause to believe the Petitioner had committed a crime for which he could be arrested.

In the interrogatory verdict, the jury specifically found that the Defendant used unreasonable force on the Petitioner and the jury found that the Defendant acted with malice toward the Petitioner. The jury also specifically found that the Defendant's actions toward the Petitioner were malicious and were a proximate or legal cause of the Plaintiff's damages and the jury awarded the Plaintiff $972.15 in compensatory damages and $100,000.00 in punitive damages. Appendix A.

The last opinion of the Circuit Court submitted here for certiorari conflicts with decisions of this court and circuit court opinions cited in this Petition. That erroneous opinion of the Circuit Court denied the Petitioner his Seventh Amendment right to a

verdict by a jury for the reasons discussed herein.

In its first opinion, the Circuit Court cited *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) as the law which is applicable in a situation where a trial court is asked to consider a Rule 50(b) motion after the jury has returned a verdict. That court said such a motion can be granted **"as long as there is no legally sufficient evidentiary basis for a reasonable jury to find for the (non movant)."** In this case there was sufficient evidence to support the jury's verdict as the Eleventh Circuit noted by the evidence which it recited in its first opinion. Appendix C.

The Eleventh Circuit Court also said in its first opinion in this case **"a judgment as a matter of law should only be granted when there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue."** The Court cited *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192 (11th Cir. 2004).

If the evidence is sufficient to be submitted to the jury, the verdict meets the sufficiency test. In this case, it is self-evident that the District Court deemed the evidence was sufficient for the jury to decide in this case since it allowed the evidence to go to the jury.

The Eleventh Circuit said in its first opinion in this case that **a judgment as a matter of law should**

only be granted "when there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." *Arthur Pew Const. Co. v. Lipscomb*, 965 F.2d 1559, 1563 (11th Cir. 1992). There was legally sufficient evidence for the jury to find as it did in the instant case.

Notwithstanding admonitions the Circuit Court gave to the District Court in its first opinion, the District Court unabashedly referred to the jury's responses to the first and second interrogatories in its verdict in order to support its decision affirming the Rule 50(b) motion and the District Court then relied upon this erroneous reliance on selected findings of the jury in order to find that the Defendant had qualified immunity and probable cause to seize and arrest the Petitioner even though the jury actually found there was sufficient evidence to hold the Defendant accountable for his violations of the Petitioner's Fourth Amendment rights and for malicious prosecution.

This Court said in *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 36 (1944): **"It is the jury, not the court, which is the fact-finding body.** It (jury) weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instruction, and draws the ultimate conclusion as to the facts." This court continued: **"Courts are not free to re-weigh evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that others are more reasonable."**

(Emphasis added.) The District Court's second order and the Circuit Court's second opinion affirming the second order ignored the law of the case announced in the Circuit Court's first opinion.

According to this Court's statement of the law in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000), **a trial court can only grant a Rule 50(b) motion if, under governing law, there can be but one reasonable conclusion as to the verdict and only if there is no legally sufficient basis for a reasonable jury to find for that party on that issue.** Citing Fed. R. Civil. P. 50(a) and (b). The jury's verdict in this case clearly demonstrates that a reasonable conclusion could be drawn from the evidence to support the Petitioner's contentions and the verdict returned by the jury.

Considering the fact that the Eleventh Circuit itself reached conflicting conclusions in this case and considering the fact that the Circuit Court indicated in its first opinion that there could be a sufficient basis from the evidence produced during the trial for the jury to find as it did, it was improper for the District Court to grant a Rule 50(b) motion on remand as it did since the first opinion is the law of this case.

This Court also said in *Reeves* at 150 **"the court is not to make credibility determinations or weigh the evidence and should view all inferences in the light favorable to the non-moving party."** The Court **"may not substitute its view of the**

evidence for that of the jury." See also *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). " (Emphasis added.)

It is apparent that the District Court made credibility determinations, weighed the evidence and substituted its view of the evidence for that of the jury when it granted the Defendant's Rule 50(b) motion in its second order. Appendix D.

In *Gallick v. The Baltimore and Ohio Railroad Company*, 372 U.S. 108, 119 (1962), this Court said in a similar situation wherein some of the interrogatories in the verdict returned by the jury appeared to be inconsistent: **"[I]t is the duty of the courts to attempt to harmonize answers, if it is possible under a fair reading of them. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved in that way."** (Emphasis added.)

The Fifth Circuit said in *Ellis v. Weasler Engineering, Inc.*, 258 F. 3d 326, 343 (5th Cir. 2001), **"we view the evidence in the light most favorable to upholding the jury's decision by a finding of consistency."** (Emphasis added.)

This Court said in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962), **"Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved in that way."** (Emphasis added.)

And, in *Gallick, supra,* at 119, this court said, "**our courts have a special duty to reconcile seemingly inconsistent answers in a special verdict, if possible, under a fair reading of them.**" See also: *Ellis v. Weasler Engineering, Inc.*, 258 F. 3d 326, 343 (5th Cir. 2001).

The District Court in this case did not attempt to reconcile and harmonize any inconsistencies in the jury verdict as it was obliged to do under the existing law. Instead, it misconstrued the law and it misinterpreted the evidence by citing evidence presented by the Defendant as if it was the only evidence in the case while it ignored the stronger evidence which the jury obviously found credible and relied upon in reaching its verdict for the Petitioner. The Circuit Court compounded the error of the District Court by affirming its erroneous decision which was contrary to the law and the law of the case.

The Defendant did not have probable cause to believe the Petitioner had committed a crime for which he could seize the Petitioner when he did because the Petitioner had not committed a crime for which he could be arrested before the Defendant seized him.

The founding fathers of the United States and the states which they represented were committed to the principle that courts of the new states would not be contaminated as their former sovereign had influenced the courts of England. Thus, the states

insisted on the Seventh Amendment right to a jury trial before they would ratify the Constitution.

The circumstances in the instant case are similar to those which the states were attempting to avoid when they insisted that the Seventh Amendment right to a jury trial be part of the Constitution of the United States. The District Judge and the two Circuit Court judges who affirmed a Judgment Notwithstanding the Jury Verdict in this case apparently felt compelled to protect a police officer who clearly violated a citizen's Fourth Amendment rights even though a jury found otherwise. The Circuit Court's decision affirming the District Court's erroneous order violated the Petitioner's Seventh Amendment right to a jury decision.

The law and the reasoning which the Eleventh Circuit Court expressed in its first unanimous opinion in this case was ignored by the two judges on the panel that affirmed the second order of the District Court. They also ignored the legal standards and principles of law which were expressed by the Eleventh Circuit Court in its first opinion in this case.

These acts of the last Eleventh Circuit Court opinion not only violate the Petitioner's Seventh Amendment rights to a jury verdict but they also offend the citizens who are called upon to serve as jurors in such cases. The foreman of the jury in the instant case expressed to the press his dismay when

he learned that the District Judge had overturned the hard work which the jurors had devoted to this case. He was quoted by the press as stating:

> "I'm absolutely stunned that it can be thrown out on a technical thing . . . **We all thought** Dontray was to get some money as a victim – **that Cute did wrong**. What a shame."
>
> . . .
>
> "For most of that time, ***the jury could not decide the first question – whether Cute thought he was making a lawful stop for an obscured tag.*** Finally, **they agreed to concede Cute's intention to conclude deliberations**, the juror said."
>
> "We were always told, 'Do your job' or 'Read the paperwork.' **I feel betrayed**." Leusner, Jim, *Judge Tosses Award in Taser Case,* THE ORLANDO SENTINEL, April 11, 2006, at B1. (Emphasis added.)

When judges of federal courts deny citizens their right to a jury decision in order to fulfill their desire to protect a law enforcement officer even though a jury found the officer abused his power and authority and violated a citizen's Fourth Amendment rights, this Court must rectify such an abuse of power as the guardian of all the people's constitutional rights and entitlement to a jury's decision.

Both the second opinion of the Circuit Court (unpublished) and the second order of the District Court ignored the above law. Those decisions were predicated on the erroneous assumption that the Defendant had the authority to seize the Petitioner, violently pull him out of the vehicle he was in, slam him to the ground, put his foot on the back of the Petitioner's head scratching his face on the pavement, handcuff the Petitioner, shoot him twice in the back with a taser, and incarcerate him in the Orange County jail on a charge of resisting a law enforcement officer without violence although the only thing the Defendant knew about the Petitioner at the moment he physically seized him was that he claimed he believed the tag on the vehicle the Petitioner was driving was obscured (a non-arrestable infraction). The Eleventh Circuit Court in this case recited facts in the evidence in its opinion which were sufficient to sustain the jury's verdict.

The unpublished opinion of the Circuit Court which affirmed the second order of the District Court upon which the Petitioner is asking this Court to review ignored the fact there were not sufficient facts for a reasonable person to believe the Petitioner had committed a crime for which he could be seized and arrested **before** the Defendant seized and arrested the Petitioner. Under such a scenario the Defendant did not have probable cause to believe the Petitioner had committed a crime for which he could arrest him and, thus, he was not entitled to qualified immunity.

The unpublished opinion of the Circuit Court

ignored the law which states that a trial court cannot base an order granting a Motion for a Judgment as a Matter of Law Notwithstanding the Jury Verdict under Rule 50(b) on any findings of the jury and it ignored its duty to view the evidence in a light most favorable to the party for whom the jury found and the court also ignored its responsibility to follow the *stare decisis* that courts reviewing interrogatory verdicts must follow, including the Eleventh Circuit's own opinion in this case, such as making every effort to reconcile and harmonize the verdict to comport with the jury's findings whenever possible.

The Eleventh Circuit Court opinion which the Petitioner requests this court to review conflicts with all the precedents cited above and the opinion ignores the law of this case which it announced in its first opinion in this case.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant certiorari and review of this matter.

Respectfully submitted,

JACK B. NICHOLS
JACK B. NICHOLS, P.A.
801 North Magnolia Avenue
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Orlando, Florida 32803
Atty for Petitioner (407) 841-8823

APPENDICES

APPENDIX A

JURY VERDICT

DATED MARCH 3, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:04-CV-515-Orl-22KRS

DONTRAY CHANEY,

Plaintiff,

vs.

CITY OF ORLANDO, FLORIDA,
a municipal corporation, and
JONATHAN CUTE,

Defendants.
_____/

VERDICT

On the claim of the Plaintiff, DONTRAY CHANEY, against the Defendant, JONATHAN CUTE, do you find from a preponderance of the evidence:

1. That the Defendant, JONATHAN CUTE, reasonably believed that the tag of the vehicle driven by the Plaintiff, DONTRAY CHANEY, was obstructed in violation of Florida law when he stopped DONTRAY CHANEY?

Yes __X__ No _____

2. That the Defendant, JONATHAN CUTE, reasonably believed that the Plaintiff, DONTRAY CHANEY, resisted his lawful directives or attempted arrest?

Yes __X__ No _____

3. That the Defendant, JONATHAN CUTE, intentionally committed acts that violated the Plaintiff, DONTRAY CHANEY'S, federal constitutional right not to be subjected to excessive or unreasonable force during an arrest by:

(a) using unreasonable force in effecting the arrest of DONTRAY CHANEY?

Yes __X__ No _____

(b) using unreasonable force when he tased DONTRAY CHANEY?

Yes __X__ No _____

Yes __X__ No _____

4. That the Defendant, JONATHAN CUTE, acted with malice in pursuing the traffic citation against the Plaintiff, DONTRAY CHANEY?

Yes __X__ No _____

5. That the Defendant's, JONATHAN CUTE'S, acts were the proximate or legal cause of damages sustained by the Plaintiff, DONTRAY CHANEY?

Yes __X__ No _____

6. That the Defendant, the CITY OF ORLANDO, FLORIDA, had a custom or policy that resulted in the constitutional violations, that is the CITY OF ORLANDO, FLORIDA was deliberately indifferent to the need to train or supervise its officers on the issues of false arrest, excessive force, or malicious prosecution which resulted in officer JONATHAN CUTE violating the constitutional rights of the Plaintiff, DONTRAY CHANEY?

Yes _____ No __X__

7. That any of the aforementioned acts were a proximate or legal cause of the damages sustained by the Plaintiff, DONTRAY CHANEY?

Yes __X__ No _____

8. That DONTRAY CHANEY should be awarded damages to compensate for the reasonable cost of medical care?

Yes __X__ No _____

If your answer was Yes,
in what amount? $511.17

9. That DONTRAY CHANEY should be awarded damages to compensate for the reasonable cost of the Plaintiff's bond, automobile retrieval, and the defense of the Plaintiff's traffic court hearing?

Yes X No _____

If your answer was Yes,
in what amount? $460.98

10. That DONTRAY CHANEY should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

Yes _____ No X

If your answer was Yes,
in what amount? $_____

11. That the Defendant, JONATHAN CUTE, acted with malice or with reckless indifference to DONTRAY CHANEY'S federally protected rights and that punitive damages should be assessed against the Defendant?

Yes X No _____

If your answer was Yes,
in what amount? $100,000

SO SAY WE ALL, this 3rd day of March, 2006.

s/ _____
FOREPERSON

APPENDIX B

DISTRICT COURT ORDER

DATED APRIL 7, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONTRAY CHANEY,

Plaintiff,

-vs- Case No. 6:04-cv-515-Orl-22KRS

CITY OF ORLANDO, FLORIDA and JONATHAN CUTE,

Defendants.

ORDER

I. INTRODUCTION

This cause comes before the Court on Defendant Jonathan Cute's Motion for Judgment in His Favor and Against the Plaintiff as a Matter of Law (Doc. 158)[1] and supporting Memorandum of Law (Doc. 159), filed on March 10, 2006, to which Plaintiff responded (Doc. 162) on March 17, 2006. Having reviewed the jury verdict, motions, memoranda, and trial testimony this Court GRANTS Defendant's

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[1] This motion was improperly titled on the docket entry as a Motion to Set Aside Verdict and Enter Judgment in favor of the Defendant.

motion and enters judgment in favor of both City of Orlando and Jonathan Cute.

II. BACKGROUND

A. Evidence Adduced at Trial

Orlando Police Department Officer Jonathan Cute ("Officer Cute") testified that on the evening of June 5, 2003, he parked his vehicle in the driveway of an office building so that he could monitor traffic moving north and southbound on Mercy Drive. At sometime during the hour of 8 p.m., Officer Cute observed a Pontiac Grand AM ("Grand AM")[2] with an obscured rear tag as it passed the front of his patrol car. Officer Cute claims that he drove directly behind the Grand AM and activated the lights on his cruiser. The Grand AM pulled into the parking lot of Mercy Market, a convenience store located at 1430 Mercy Drive in Orlando, Florida. Officer Cute notified the police dispatcher that he was stopping a vehicle. Officer Cute claims that even though his cruiser was stopped probably only five feet away from the rear of the Grand AM, he had to sit on the edge of his seat and pull himself up to the steering wheel in order to see all the numbers and letters on the tag of the Grand AM because the tag was so difficult to read. Sergeant Klem, Officer Cute's immediate supervisor who arrived on the scene later, testified that the rear tag on the Grand AM was obscured by a smokey tag

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[2] The two-door, 1996 Pontiac Grand AM driven by Dontray Chaney belonged to his cousin, Antawain Greene.

cover, which made reading the tag numbers difficult in certain light. After making the transmission to the dispatcher, Officer Cute noticed that the driver of the Grant AM had already exited the vehicle.

The driver of the Grand AM Dontray Chaney ("Chaney" or "Plaintiff"), admits that there was a cover on the tag of the Grand AM, but claims that the cover did not obscure the numbers on the tag. Chaney states that on the evening of June 5, 2003, he noticed a police cruiser entering the Palms Apartments just as he was exiting the complex to travel to the nearby Mercy Market. Chaney states that Officer Cute turned his blue lights on as Chaney was pulling out of the apartment complex. Chaney claims that he then pulled into the Mercy Market parking lot, placed the vehicle in park, exited the vehicle, and asked Officer Cute the reason for the stop. Chaney claims that Officer Cute told him to get back in the car. Chaney asserts that he immediately reentered the vehicle and sat with the door cracked, his feet inside, and his hands in his lap. Chaney states that his license was in one of his hands. According to Chaney, Officer Cute then reached in the car as if he was going to put his hand to the ignition. Chaney admits that he placed his hands over the ignition and asked Officer Cute what he was doing. Chaney states that Officer Cute then put Chaney's left arm behind Chaney's back, grabbed him by his neck, in a choke hold, and pulled him out of the car. Chaney further claims that Officer Cute dropped him to the ground. According to Chaney, Officer Cute then applied a lot of pressure between

Chaney's shoulder blades. Chaney claims that Officer Cute put one of Chaney's hands in handcuffs. Chaney states that Officer Cute put a Taser gun to his head and asked him if he wanted some of it. Chaney further states that Officer Cute then tased him. Chaney states that he never attempted to resist or obstruct Officer Cute other than when he was tased, a reaction that Chaney describes as very painful and he had no self-control over his body. Chaney claims that he does not remember being tased two different times as much as he remembers one long continuous tasing. Chaney claims that he rolled over, only to be rolled back by Officer Cute, who then stepped on Chaney's head and applied pressure to it as if he was squishing out a cigarette. According to Chaney, Officer Cute's actions caused Chaney's face to rub the pavement, leaving Chaney with abrasions on his face.

By contrast, Officer Cute maintains that Chaney did not immediately reenter the vehicle when initially ordered to do so. Officer Cute states that he drew his taser and ordered Chaney to get back into the vehicle a second time. Officer Cute furthers that when Chaney did not immediately reenter the vehicle after being told a second time to do so, he became concerned that Chaney would either flee or physically challenge him. Chaney reentered the vehicle as Officer Cute was approaching him. Officer Cute claims that he asked for Chaney's license, registration, and proof of insurance once he was standing next to Chaney, who was sitting in the driver's seat of the Grand AM with the door open.

Officer Cute recalls that Chaney responded by telling him not to point the taser at him. Officer Cute says that Chaney was argumentative, wanted to know why Officer Cute had stopped him, and did not immediately attempt to retrieve his license. Officer Cute claims that he asked for Chaney's information a second time. According to Officer Cute, Chaney then attempted to step out of the vehicle. Officer Cute maintains that he then advised Chaney that Chaney was under arrest for "resisting." [3] Chaney claim that Officer Cute never asked him for his license or registration and that he never told Chaney that he was under arrest. Officer Cute furthers that Chaney then pushed Officer Cute's hands away and leaned across the passenger's seat towards the floorboard of the vehicle with his back towards Officer Cute. Chaney denies that he attempted to exist the vehicle again, push the door open, or lean over to the other side of the vehicle.

In the Charging Affidavit, Officer Cute describes Chaney's arrest as follows:

> I took a hold of [Chaney's] left arm and pulled him out of the vehicle. I then placed [Chaney] in a bear hug hold due to the fact that he had tensed his upper torso and arms, preventing me from handcuffing him. I held [Chaney] and called for non-emergency assistance. [Chaney] attempted to twist away from

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[3] Charging Aff. (Pl.'s ex. 21).

> me. I then directed [Chaney] to the ground while still in a bear hug hold. Once on the ground, I placed my left knee between [Chaney's] shoulder blades. I ordered [Chaney] to place his hands behind his back. [Chaney] tensed his right arm as I took a hold of it. I managed to place one handcuff on [Chaney's] right wrist. Chaney attempted to pull his right hand away. I drew my department issued taser and cycled it into [Chaney's] lower back. [Chaney] rolled onto his back. I ordered [Chaney] to roll onto his stomach and place his hands behind his back. [Chaney] began to raise up from the ground, at which time I cycled my taser a second time. Officer Michael, Officer Burch, and Sergeant Klem arrived at my location. Officer Burch and Officer Michael then handcuffed [Chaney] without further incident. [Chaney] received a minor abrasion on his left cheek. I believe this occurred when we went to the ground.[4]

Officer Cute claims that he discharged the taser a second time because he feared that Chaney might regain control of his right hand, possibly enabling Chaney to assault Officer Cute with the loose handcuff. Chaney states that he was still on the

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[4] *Id.*

ground when the other officers arrived at the scene.

Meanwhile a hostile crowd of onlookers had gathered during the incident. Chaney states that he asked someone in the crowd if he could use his or her phone so he could call his mom. Chaney claims that just as someone asked him for his phone number, Officer Cute grabbed Chaney by his throat, slammed Chaney's head on the back of the trunk and told Chaney not to say a word. Sergeant Klem instructed Officer Cute and the other officers to have Chaney's car towed and to leave the area as soon as possible. Chaney was placed in Officer Michael's police car and removed from the area. Officer Cute, Sergeant Klem, and other officers remained at the scene to wait for a towing company to retrieve the Grand AM driven by Chaney. Before the car was towed, Officer Cute performed an inventory search of the vehicle. Officer Cute states that he believed there may have been contraband in the vehicle given Chaney's behavior and the defensive posture Chaney took by standing outside the Grand AM before Officer Cute made contact with him. No contraband was found. Chaney claims that Officer Cute and/or other officers scattered the contents of the glove compartment about the interior of the car, removed the lining of the trunk, and left the contents of the trunk in disarray.

Chaney was transported to a location on W.D. Judge Drive in Orlando, Florida. Chaney claims that an officer asked him questions like "How did the fucking taser feel" while he was sitting in the police

cruiser. Chaney also claims that the officers eventually had him sit on the side of the road but that he was placed in the cruiser again once it began to rain hard. The officers then transported Chaney to a warehouse area located on Princeton Street between Orange Blossom Trail and John Young Parkway. Sergeant Klem claims that he directed the officers to take Chaney to that location because the warehouse area had a roof with two open sides, was open to the public, and an environment away from the crowd where Sergeant Klem believed he could question Chaney, take pictures of the taser probes, and conduct a use of force investigation. Sergeant Klem observed an abrasion on Chaney's cheek and, per Orlando Police Department policy, took a picture of the abrasion and the location where taser prongs had connected to Chaney's body. Sergeant Klem removed the prongs which, until that time, were still attached to Chaney's back. Sergeant Klem estimates that the investigation took approximately 15 minutes. Officer Cute subsequently tranported Chaney to the Orange County Correctional Facility.

Chaney was issued a citation for operating a vehicle with an obscured license plate in violation of Florida Statute § 316.605 and charged with resisting an officer without violence in violation of Florida Statute § 843.02.[5] An Orange County Traffic Court Hearing Officer found Chaney not guilty of the charge of driving a car with an obscured license

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[5] Charging Aff. (Pl.'s ex. 21).

plate.[6] Additionally, "[t]he criminal charge of resisting an officer without violence was ultimately dropped."[7]

B. Procedural History[8]

After a four day trial the jury returned findings, regarding the claims against Officer Cute, on its Jury Verdict (Doc. 152). The first finding was that Officer Cute reasonably believed that the tag of the vehicle driven by Chaney was obstructed in violation of Florida law when Officer Cute stopped Chaney. The second finding was that Officer Cute reasonably believed that Chaney resisted his lawful directives or attempted arrest. The third was that Officer Cute intentionally committed acts that violated Chaney's federal constitutional right not to be subjected to excessive force during an arrest by using unreasonable force in effecting the arrest of Chaney and using unreasonable force when he tased Chaney. The fourth finding was that Officer Cute acted with malice in pursuing the traffic citation

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[6] *See* Joint Pretrial Statement (Doc. 125) at 29.

[7] Memorandum of Law in Support of Defendant City of Orlando's Motion for Summary Judgment (Doc. 61) at 4 (citing *State v. Chaney*, Criminal Case No. 48-2003-MM-008414-O in the Ninth Judicial Circuit Court in and for Orange County, Florida).

[8] This order does not discuss the case it as it pertains to the Defendant City of Orlando ("the City"). The jury found for the City on all claims against it and the plaintiff has not challenged the jury's verdict as it relates to the City. Judgment for the City will be entered accordingly.

against Chaney. The sixth finding was that Officer Cute's acts were the proximate cause or legal cause of damages sustained by Chaney. The jury went on to make findings in regard to damages. It awarded, against Officer Cute, $511.17 for medical care, $460.98 for compensatory damages, and $100,000 in punitive damages to Chaney.

Based upon these findings by the jury and the Court's review of applicable case law on qualified immunity, discussed below, Officer Cute is entitled to a judgment in his favor.

III. LEGAL ANALYSIS

A. False Arrest

"Plainly, an arrest without probable cause violates the right to be free from an unreasonable search under the Fourth Amendment to the United States Constitution." *See Storck v. City of Coral Springs*, 354 F.3d 1307, 1314 (11th Cir. 2003). "However, if an officer has probable cause to believe that an individual has committed even a *very minor criminal offense in his presence,* he may, without violating the Fourth Amendment, arrest the offender." *Id.* (internal citation and quotation marks omitted) (emphasis added).

The concept of "probable cause exists when an arrest is objectively reasonable based on the totality of the circumstances." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11 th Cir. 2003) (internal citation and

quotation marks omitted) (emphasis added). An arrest is objectively reasonable "when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. *Id.* (internal citation and quotation marks omitted).

The Plaintiff argued that the initial stop was invalid, stating that the rear license plate on the Grand AM was never obstructed. At summary judgment, the Plaintiff submitted a photograph of the tag taken by the owner of the Grand AM, Antawain Green. The photograph was taken, according to the affidavit of Green, immediately after the police released the car to him.[9] Based solely on the appearance of the tag in the picture, the Court found on summary judgment that no reasonable officer could have concluded that the license tag was obscured in violation of Florida Statute § 316.505.[10] Section 316.505 requires that license plates be free from any "obscuring matter[] so that they will be plainly visible and legible at all times 100 feet from the rear or front." Fla. Statute 316.505(1). This Court agreed with the Plaintiff at summary judgment and found for the Plaintiff, deciding that there was no genuine issue of material fact on this point.

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[9] Green Aff. (Doc. 75-7)

[10] Summ. J. Order (Doc. 103).

Inexplicably, the Plaintiff decided to re-litigate the obstructed tag issue at trial. First, the plaintiff argued during opening statement that the tag was not obstructed and that the evidence would demonstrate as much. Then the Plaintiff allowed testimony in his case-in-chief that created a jury issue regarding the tag. After Plaintiff called Officer Cute to the stand, he described how he not only was unable to read the numbers on the license plate from 100 feet away, but that he had difficulty reading the numbers from within ten feet. The owner of the Grand Am presented new evidence during his testimony. He testified that he took the picture of the license plate the day after the arrest, not at the towing yard, but later that day at his house. The owner then stated that the Grand AM had been pulled over before this incident for a possible obstructed tag violation. Sergeant Klem also testified during the Plaintiff's case that the tag on the Grand Am did not look like the one in the picture. With the Plaintiff's implicit consent to try the issue and the new evidence presented in the Plaintiff's case as to whether the tag was obstructed, the question became an issue to be determined by the jury. The jury found that Officer Cute reasonably believed that the tag of the Grand Am was obstructed in violation of Fla. Stat. § 316.605(1).

The Plaintiff is now asking the Court to ignore this finding because the Court had already ruled on the issue at summary judgment. It is the Plaintiff who is ignoring the fact that it was the Plaintiff who resurrected this issue by allowing conflicting

evidence on this issue to be introduced during his case in chief. The Plaintiff reviewed the first question on the jury verdict form and raised no objection before the Court submitted it to the jury. Now, after the jury has ruled against the Plaintiff, the Plaintiff wants the Court to act as if the issue was never submitted to the jury. This issue was tried by consent of the Plaintiff. The jury finding regarding the stop is important because it gave the jury a reasonable basis for finding probable cause to make the arrest.

The Charging Affidavit (Pl. ex. 21) shows that Chaney was charged with "resisting without violence" pursuant to Fla. Stat. § 843.02. Section 843.02 reads, in pertinent part:

> Whoever shall resist, obstruct, or oppose any officer . . . or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

A plain reading of the statute shows that this provision is applicable to persons resisting, obstructing, or opposing any officer in the lawful execution of *any* legal duty, not solely in the lawful execution of an arrest. The jury found that Officer

Cute reasonably believed that Plaintiff resisted Officer Cute's lawful directives or attempted arrest. A reasonable belief is enough to create probable cause. *Durruthy*, 351. F.3d at 1090. Since Officer Cute had probable cause Plaintiff's cause of action for false arrest fails. Officer Cute is entitled to a judgment in his favor on this claim.

B. Malicious Prosecution

"To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures." *Kingsland*, 382 F.3d 1220, 1234 (11th Cir. 2004) citing *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003)). Florida law requires that six elements be established to prove a claim of malicious prosecution:

> (1) an original judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damages as a result of the original

proceeding.

Id. (citing *Durkin v. Davis*, 814 So. 2d 1246, 1248 (Fla. 2d DCA 2002)).

Officer Cute admits that the Plaintiff meets the first, second and third elements of the Florida law on malicious prosecution. Doc. 125-1. The jury found that there was malice in the Officer Cute's prosecution of the traffic citation. Doc. 152. The jury also found that the Plaintiff suffered damages as a result of the original proceeding in the amount of $460.98. *Id.* However, the jury also found that Officer Cute had a reasonable belief to effect both the traffic stop and the arrest based on the Plaintiff resisting his arrest. *Id.* A valid claim for malicious prosecution must meet all six of these elements. *Kingsland*, 382 F.3d 1234. Since the Plaintiff did not establish the fourth element his claim for malicious prosecution fails. Officer Cute is entitled to judgment on this claim.

C. Excessive Force

The Plaintiff alleges that Officer Cute used excessive force in effecting his arrest. Officer Cute asserts that he has qualified immunity on this claim. Before this Court could determine whether Officer Cute had qualified immunity it was necessary for the jury to decide whether Officer Cute had probable cause to make the arrest. The jury found that Officer Cute had probable cause to arrest Chaney ; additionally, it found that Officer Cute used excessive

force in effecting the arrest as a matter of fact. Nevertheless, the Court has an independent obligation, through its qualified immunity analysis, to determine if the force used by Officer Cute was excessive as a matter of law. *See Johnson*, 280 F.3d at 1317

1. Qualified Immunity

Qualified immunity provides a complete defense from suit and from liability for government officials who are sued in their individual capacities for the performance of their discretionary functions. *See Storck*, 354 F.3d at 1313-14. Qualified immunity's protection exists as long a the official's conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." . *Id. at* 1313 (quoting *Lassiter v. Ala. A & M Univ. Bd. of Trustees* , 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). The purpose of qualified immunity

> is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law. Because qualified immunity is a defense not only from liability, but also from suit, it is important for a court to ascertain the

> validity of a qualified immunity defense as early in the lawsuit as possible.

Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 1998) (internal citations and quotations omitted).

Qualified immunity should first be considered when the complaint is filed. If it is unclear that the defendant is entitled to qualified immunity from the complaint alone then the case should proceed to summary judgment. The Eleventh Circuit states, and this Court recognizes the summary judgment is the normal "juncture at which the defendants are released from the threat of liability and the burden of further litigation." *Johnson v. Breeden*, 280 F.3d 1308, 1317 (11th Cir. 2002) (internal citations omitted). However, even at the summary judgment stage, viewed in a light most favorable to the plaintiff, demonstrate that "there are facts that are inconsistent with qualified immunity being granted[;] the case and the qualified immunity issue along with it will proceed to trial." *Id.*

Defendants may, again, raise the qualified immunity issue at the end of the plaintiff's case in chief through a Fed. R. Civ. P. 50(a) motion. Typically, that motion would be denied because the evidence presented in the plaintiff's case in chief will be the same evidence that prevented the court from granting summary judgment. *See id.* at 1317-18. The defendant may re-assert the issue of qualified immunity after a jury verdict is entered. The Eleventh Circuit states:

> [i]t is important to recognize, however, that a defendant is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter a post-trial decision on the defense. When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.

Id. at 1318 (internal citations omitted) . Should disputed facts remain after a jury has reached its verdict then, in deciding the qualified immunity issue, a court must view those facts in a light most favorable to the plaintiff. *Priester v. City of Rivera Beach, Fla.*, 208 F.3d 919, 926 n.3 (11 th Cir 2000) (internal quotations and citations omitted) .

A qualified immunity analysis requires first that the public official prove that he or she "was acting within the scope of his [or her] discretionary function when the allegedly unconstitutional acts took place." *Storck*, 354 F.3d at 1314 (quoting *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991)). In the instant case, both parties stipulate that Officer Cute was and currently is employed by the City of Orlando as a law enforcement Officer in the

Orlando Police Department and that he was acting in his official capacity at the time of all actions taken involving the Plaintiff.[11] Once it is established that the public official was acting within the scope of his or her discretionary authority, "the burden shifts to the plaintiff to establish that qualified immunity does not apply." *Id.*

To determine whether qualified immunity applies, the Court must first ask the threshold question of whether the facts adduced at trial, taken in the light most favorable to Plaintiff, show that Officer Cute's conduct violated a constitutional right. *See Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The Court must view the facts that are disputed in the Plaintiff's favor. *Priester*, 208 F.3d at 926 n.3. Next, if the evidence can be said to establish the violation of a constitutional right, the Court must determine whether that right was clearly established at the time of the violation. *See id.*

a. Violation of a Constitutional Right-Excessive Force

"The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." *Durruthy*, 351 F.3d at 1093. "A court looks to the totality of the

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[11] Joint Pretrial Statement (Doc. 125) at 10.

circumstances to determine whether the manner of arrest was reasonable." *Draper v. Reynolds*, 369 F.3d 1270, 1277 (11th Cir. 2004) (internal citations omitted). Not every push or shove, however, violates the Fourth Amendment. *See Saucier*, 533 U.S. at 209. As the Eleventh Circuit has recognized, the application of *de minimis* force "will not support a claim for excessive force." *Durruthy*, 351 F.3d at 1094 (internal citation omitted).

The decisions rendered in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000), and *Jones v. City of Dothan*, 121 F. 3d 1456 (11th Cir. 1997) are instructive on this point. In *Vinyard*, the Eleventh Circuit concluded that where an officer grabbed the plaintiff's arm, jerked her out of a chair, handcuffed her behind her back, and later dragged her into the jail by either her shirt, arm, or hair, the force applied was *de minimis*. *See Vinyard*, 311 F. 3d at 1349 n.13. Likewise, in *Nolin*, the appellate court concluded that where an officer grabbed the plaintiff from behind by the shoulder and wrist, threw him against a van, kneed him in the back, pushed his head into the side of the van, searched his groin in an uncomfortable manner, and handcuffed him, the force applied was *de minimis*. *See Nolan*, 207 F.3d at 1258-59. Finally, in *Jones*, the Eleventh Circuit concluded that where an officer slammed the plaintiff against a wall, kicked his legs apart, required him to put his arms above his head, and pulled his wallet from his pants pockets, the force was *de minimis* notwithstanding the pain the plaintiff experienced

from "having to lift his arms since he had previously suffered a stroke," and the pain he experienced from "his arthritic knee from having his legs kicked apart." *Jones*, 121 F.3d at 1460. Incidentally, the plaintiff in *Jones*, like the Plaintiff in this case, sought medical treatment for his injuries. *See also Durruthy v. Pastor*, 351. F.3d 1080 (11th Cir. 2003) (finding force *de minimis* where officer grabbed plaintiff from behind, forced plaintiff to the ground, and handcuffed plaintiff); *Gold v. City of Miami*, 131 F.3d 1442 (11th Cir. 1997) (finding force *de minimis* where officer handcuffed plaintiff too tightly and refused to loosen them for more than twenty minutes); *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993) (finding force *de minimis* where officer pushed plaintiff against a wall and applied a choke-hold before placing the plaintiff in handcuffs).

As an initial matter, the jury also found that Officer Cute had valid grounds to both make the traffic stop and to arrest Chaney. What occurred after the stop was made is disputed. Viewed in the light most favorable to the Plaintiff, the facts and circumstances in this case incident to the Plaintiff's arrest are: (1) Officer Cute reached in the car in an attempt to take the keys out of the ignition; (2) Chaney placed his hands over the ignition and asked Officer Cute what he was doing; (3) Officer Cute then put Chaney's left arm behind Chaney's back, grabbed him by his neck, in a choke hold, and pulled him out of the car; (4) Officer Cute dropped him to the ground where Officer Cute then applied pressure between Chaney's shoulder blades; (5) Officer Cute put one of

Chaney's hands in handcuffs; (6) Officer Cute put a Taser to Chaney's head and asked him did he want some of it; (7) Officer Cute tased Chaney in the lower back; (8) Chaney rolled over, only to be rolled back by Officer Cute, who then stepped on Chaney's head; (10) Officer Cute's actions caused Chaney's face to rub against the pavement; and (11) after Chaney was in both handcuffs Officer Cute grabbed Chaney by the throat and pushed his head down on the trunk of the police cruiser as Chaney tried to communicate with a crowd of bystanders.

Although the Court must consider the facts and circumstances in the light most favorable to the Plaintiff, the Court cannot ignore other factors involved in the arrest. The incident took place at night. Traffic stops are one of the most dangerous activities that police officers undertake.[12] Officer Cute was alone. A routine stop was quickly escalating into a dangerous encounter for all involved. Chaney admits to initially getting out of his car. He also admits that he blocked Officer Cute's attempt to take the keys out of the ignition, actively resisting Officer Cute. A boisterous crowd had gathered. During the struggle, but before Officer Cute deployed the taser, Officer Cute was only able to secure one of Chaney's wrists in the handcuffs, leaving the other handcuff dangling from Chaney's arm as a potential weapon.

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[12] Plaintiff's expert admitted as much during his testimony.

Plaintiff contended that this was an illegitimate use of force because Officer Cute did not have probable cause to effect the arrest. At the time the Court was considering the summary judgment motion it was unclear as to whether Officer Cute had probable cause or even arguable probable cause. Without arguable probable cause any force Officer Cute used would have been excessive. *See Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000). However, the jury concluded that Officer Cute had probable cause and the authority to make the arrest. The authority to make an arrest permits an officer to use reasonable force. Reasonable force is determined by the Court after considering the circumstances surrounding the use of force. In doing so, this Court must consider that "police officers are often forced to make split-second judgments– in circumstances that are tense, uncertain, and rapidly evolving– about the amount of force that is necessary in a particular situation." *Draper*, 369 F.3d at 1278 (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). Under the auspices of *Vinyard, Nolin, and Jones*, this Court determines the force used by Officer Cute in effecting the arrest was no more than *de minimis*.

The only application of force that could be arguably more than *de minimis* is Chaney's testimony that Officer Cute slammed Chaney's head on the trunk of the police cruiser after Chaney was in handcuffs. The Court notes that the only other evidence presented on this part of the incident was Officer Cute's testimony; Officer Cute denied that he slammed Chaney's head into the trunk of the

cruiser.[13] The Court must view the evidence in a light most favorable to the Plaintiff. Nevertheless, the Court concludes that this particular application of force was *de minimis*. The jury found that the Plaintiff was resisting Officer Cute. Even though Chaney had been handcuffed, the situation was not yet under control. Chaney was trying to communicate with the hostile crowd. A reasonable officer could have believed that Chaney was trying to incite a violent reaction from the crowd. A reasonable officer could have then also believed that he needed to stop Chaney from interacting with the crowd as quickly as possible. "Government officials are not required to err on the side of caution[;] qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." *Ferraro,* 284 F.3d at 1200 (internal quotations and citations omitted). An arrest is a fluid event, not stagnate separate stages brought together under a common title. One thing builds on another. This Court is required to look at the totality of the circumstances. *Draper*, 369 F.3d at 1277 (internal quotations and citations omitted). In doing so, the Court concludes Officer Cute's use of force in making the arrest was *de minimis* and did not otherwise violate any of the Plaintiff's constitutional rights. *See id.*

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[13] Neither the bystanders who testified or Sergeant Klem, who was at the scene when this reputed incident happened, were asked questions regarding the head-slamming incident on direct or cross.

Since Officer Cute did not infringe upon the Plaintiff's Fourth Amendment rights, this Court does not have to reach the question of whether the rights were clearly established. However, the Court believes it is appropriate, in the interest of thoroughness, to do so.

b. Clearly Established Law

There are two different ways to demonstrate that the law "clearly established a particular amount of force was excessive." *Ferraro*, 284 F.3d at 1198. The first is to show that there is case law, decided prior to the instant case, showing that what the police officer did was unlawful. *Id.* "The burden of showing that an officer violated clearly established law falls on the plaintiff." *Jackson*, 206 F.3d at 1165. Qualified immunity will fail where, under existing case law, no reasonable officer in the defendant's situation would conclude that the force was unlawful. *Id.* This method of proof can be difficult because the prior case must be factually similar enough to put the police officer on notice. *See Ferraro*, 284 F.3d at 1198-99.

For that reason the Eleventh Circuit recognizes a narrow exception "also allowing parties to show that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official notwithstanding the lack of case law." *Id.* at 1199 (internal quotations and citations omitted). Under this exception a plaintiff

must show that the police officer's

> conduct was so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without case law on point. This test entails determining whether application of [excessive force] standard would inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful.

Priester, 208 F.3d at 926 (internal quotations and citations omitted).

There is no case law that clearly establishes that the use of a taser is unreasonable force in this present situation. The jury found that Officer Cute had a valid basis to make the traffic stop and to effect the arrest.[14] Again, Officer Cute followed Orlando Police Department guidelines in using his taser. In fact, he could have used the taser at an earlier stage, but instead he attempted to gain Chaney's compliance without its use.

The only Eleventh Circuit case that is analogous to the instant case is *Draper v. Reynolds*,

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[14] The Court notes that at the summary judgment stage the Court could not rule that Officer Cute was entitled to qualified immunity based on the lack of clearly established law because an issue of fact existed at that time concerning whether there were valid grounds for either the stop or the arrest.

369 F.3d 1270, 1270 (11th Cir. 2004). At the outset, the Court notes that *Draper* was decided nearly a year after the incident in the instant case occurred, so it could not have constituted clearly established law on the date this incident occurred. *Id.* In *Draper*, the officer deployed his taser on an arrestee who was belligerent, hostile, and uncooperative. *Id.* at 1278. The Eleventh Circuit panel found that this was acceptable use of force, stating that the use of the taser probably prevented a physical confrontation, which could have resulted in serious injury for either party. *Id.* Hence, even if it had been decided before the date in question, the *Draper* case could not have given Officer Cute notice that his actions could be construed to be excessive force.

There is no case law that clearly establishes Officer Cute's use of force to stop Chaney from communicating with the hostile crowd was unreasonable. *See Vinyard*, 311 F. 3d 1350-51, *Nolin*, 207 F.3d at 1257, and *Jones*, 121 F.3d at 1460. The Eleventh Circuit in *Lee v. Ferraro* dealt with the issue of whether slamming an arrestee's head on the car trunk after the arrestee was in handcuffs constituted excessive force; but the instant case is factually indistinguishable. *Ferraro*, 283 F.3d at 1197. In the *Ferraro* case the officer, a large man, pulled the arrestee, a short woman, over for honking her horn. *See id.* at 1190-91. The officer grabbed her wrist and roughly pulled her out of the car and handcuffed her. *Id.* at 1191. He then led her around to the trunk of the car and slammed her head on the trunk. *Id.* She was arrested for resisting arrest with

violence and failure to obey a police officer. *Id.* These charges were latter dropped. *Id.* at 1192-93. The arrestee suffered both permanent physical and mental injuries from the encounter. *Id.* at 1192. The arrestee brought multiple claims against the officer and the City of Miami. *Id.* at 1193. The district court denied qualified immunity for the officer at summary judgment on the claims of false arrest and excessive force. *Id.* On appeal, the Eleventh Circuit stated that summary judgment on the basis of qualified immunity for the excessive force claim was inappropriate in this situation. *Id.* at 1200. The court went to great lengths to demonstrate why this case was unlike the majority of instances where the Eleventh Circuit had granted qualified immunity for excessive force claims. *See id.* at 1198-1201. The court stated that honking a horn is about as insignificant a crime as exists. *Id.* at 1198. It also noted that the arrestee did not resist the arrest. *Id.* The court then pointed out that once she was secured in handcuffs the arrestee presented neither a danger to the officer nor a risk of flight. *Id.* The court affirmed the denial of summary judgment based on qualified immunity on the excessive force claim. *Id.* at 1201.

The instant case is factually distinguishable. Officer Cute had probable cause to arrest Chaney and, as already demonstrated in this order, had authority to use reasonable force in effecting that arrest. The jury found that the Plaintiff was resisting Officer Cute. Placing the Plaintiff in handcuffs in the instant case did not vitiate the

danger. There was a hostile crowd, with which the Plaintiff was trying to communicate . Officer Cute could have reasonably believed that he needed to use force to stop the Plaintiff from communicating with the crowd. The Plaintiff has not alleged any permanent, or even significant, injuries. The *Ferraro* court recognizes that only in clearly egregious cases should the court deny qualified immunity; qualified immunity should be granted in close cases. *See id.* at 1200. Since *Ferraro* is distinguishable, that case did not give Officer Cute notice that his actions could be construed to be excessive force.

Additionally, Officer Cute's actions do not meet the narrow exception of rising to the level of obviously violating Chaney's Fourth Amendment rights. Officer Cute had probable cause to arrest Chaney and used force authorized by his police department, which was not patently excessive. Therefore, Officer Cute is granted qualified immunity on the excessive force claim.

D. Damages

The Plaintiff must have a valid claim for the Plaintiff to receive damages. Since the Plaintiff does not have any valid claims he is not entitled to recover damages.

V. CONCLUSION

Based on the foregoing, it is **ORDERED** as follows:

1. Defendant Jonathan Cute's Motion For Judgment in His Favor and Against The Plaintiff as a Matter of Law (Doc. 158), filed March 10, 2006, is **GRANTED**.

2. The Clerk shall enter a final judgment in favor of the Defendant City of Orlando and in favor of Defendant Jonathan Cute.

3. All other Plending motions ar**DENIED** as moot.

4. The Clerk shall close the case.

DONE and **ORDERED** in Chambers, in Orlando, Florida on April 7, 2006.

s/_____
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record

APPENDIX C

11TH CIRCUIT OPINION

DATED APRIL 11, 2007

C-1

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 06-12647

District Court Docket No.
04-00515-CV-ORL-22KRS

DONTRAY CHANEY,

Plaintiff-Appellant,

versus

CITY OF ORLANDO, FL,
a municipal corporation,
JONATHAN CUTE,

Defendants-Appellees.

FILED
U.S. COURT OF
APPEALS 11th CIRCUIT
APRIL 11, 2007

A True Copy - Attested
Clerk U.S. Court of
Appeals,
Eleventh Circuit
By: s/_____

Appeal from the United States District Court
for the Middle District of Florida

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 11, 2007

For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

ISSUED AS MANDATE
MAY 11, 2007
U.S. COURT OF APPEALS
ATLANTA, GA.

ORIGINAL CORRECTED
CHANEY v. CITY OF ORLANDO, FL 1666

Dontray CHANEY, Plaintiff-Appellant,
v.
CITY OF ORLANDO, FLORIDA, a municipal corporation, and JONATHAN CUTE, Defendants-Appellees.

No. 06-12647.

United States Court of Appeals,
Eleventh Circuit.

April 11, 2007.

Background: Arrestee brought action against city and police officer, alleging claims for wrongful arrest, excessive force, and malicious prosecution. After the jury returned a special verdict in arrestee's favor, the United States District Court for the Middle District of Florida, No. 04-0051-CV-ORL-22KRS, Anne C. Conway, J., granted officer's renewed motion for judgment as a matter of law (JMOL), and arrestee appealed.

Holding: The Court of Appeals, Birch, Circuit Judge, held that court engaged in an erroneous analysis in deciding officer's motion.

Reversed and remanded.

1. Federal Courts ~ 776

District court's ruling on a motion for judgment as a matter of law (JMOL) is subject to *de novo* review. Fed.Rules Civ.Proc. Rule 50, 28 U.S.C.A.

2. Federal Civil Procedure ~ 2608.1, 2610

In ruling on police officer's renewed motion for judgment as a matter of law (JMOL) on arrestee's civil rights claims, court should have limited its inquiry as to whether there was sufficient evidence in the record to support a jury's finding of excessive force and its imposition of liability on officer; by placing an undue emphasis on the jury's particular findings as to probable cause and by repeatedly making decision on the motion through the lens of what the jury found, the court engaged in an erroneous analysis in deciding officer's motion. Fed.Rules Civ.Proc. Rule 50(b), 28 U.S.C.A.

3. Federal Civil Procedure ~ 2372.1, 2610

A court is obligated to rule on a motion for a new trial when issuing its ruling on a renewed motion for judgment as a matter of law (JMOL). Fed.Rules Civ.Proc.Rule 50(c)(1), 28 U.S.C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH and PRYOR, Circuit Judges, and NANGLE,* District Judge.

BIRCH, Circuit Judge:

Plaintiff-Appellant Dontray Chaney brought an action, pursuant to 42 U.S.C. § 1983, against the City of Orlando, Florida, and Officer Jonathan Cute, an Orlando police officer, alleging claims for wrongful arrest, excessive force, and malicious prosecution. After the jury returned a special verdict in Chaney's favor, Officer Cute made a renewed motion for judgment as a matter of law, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, which the district court granted. Because we conclude that the district court erred in granting Officer Cute's renewed motion for judgment as a matter of law, we REVERSE the district court's judgment as to Officer Cute and REMAND this case for further proceedings consistent with this opinion.

I. BACKGROUND

The evidence adduced at trial, which we must view in a light most favorable to Chaney as the party against whom judgment was entered as a matter of law, is as follows. In the early evening of 5 Jun3 2003, Chaney was en route to Mercy Market, a convenience store located at 1430 Mercy Drive in

*Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Orlando, to pick up a few items. Chaney was driving a 1996 Pontiac Grand Am that belonged to his cousin, Antawain Green. The Grand Am had a plastic cover over the vehicle's rear license tags. After Chaney made a right turn onto Mercy Drive from the Palms Apartment complex, Officer Cute stopped him. Officer Cute illuminated his police cruiser's blue lights, and Chaney pulled the Grand Am into the parking lot of the Mercy Market and placed it in park.

After stopping the vehicle, Chaney opened his car door and began to exit the vehicle in an attempt to ascertain the reason for the traffic stop. At that time Chaney was holding his license in his hand. As Chaney was stepping out of the car, Officer Cute, who was approximately four to five feet away and was fast approaching, told Chaney to "get back in the fucking car." R14 at 8; R3-65, Exh. 1 at 13. Chaney then sat back down in the driver's seat, placed his feet back inside the vehicle with the driver side door still "cracked," and placed his hands in his lap with his driver's license in his hand. Chaney asked Officer Cute the reason for the stop, but instead of answering him, Officer Cute reached into the vehicle to pull the keys out of the car's ignition. Chaney attempted to stop Officer Cute by placing his hand over the ignition, and asked the officer what he was doing. Officer Cute then grabbed Chaney's arm and twisted it behind his back, grabbed Chaney by the neck in a "choke hold," and pulled Chaney out of the car. R14 at 9; R3-65, Exh. 1 at 15.

After pulling Chaney out of the vehicle, Officer Cute dropped Chaney to the ground and placed his knee between Chaney's shoulder blades in an attempt to pin Chaney on his stomach. Officer Cute placed one of Chaney's hands in handcuffs. Officer Cute then held a "Taser"[1] to Chaney's head and asked Chaney: "do [you] want some?" R14 at 10. Chaney testified that he did not attempt to resist arrest or struggle with Officer Cute while he was pinned to the ground, but that he again asked Officer Cute what he was doing. At this time, only one of Chaney's hands had been placed in handcuffs; Chaney's other hand was still loose. Officer Cute then stood up and, with Chaney still pinned on the ground, tased him. Chaney testified that being tased caused him to lose control over his body, and that he "felt like [he] was going to die." R3-65, Exh.1 at 17-18.

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[1]The term "Taser" refers to an electronic device used to subdue persons without causing fatal harm. A Taser is a battery-charged unit approximately the size and appearance of a flashlight. It holds two replaceable cartridges, each containing a hooked barb, or dart, attached to the cartridge by a long, electricity-conducting insulated wire. Each dart can be fired independently by depressing the corresponding lever located on the frame of the Taser. When the probes make contact with the target, the Taser transmits high voltage electrical current along the wires and into the body of the target. In addition, after the Taser's initial "shot" has been fired and contact has been made, an electrical current may be transmitted through the wire to the target by repeatedly pressing on the Taser's lever. *See Draper v. Reynolds*, 369 F.3d 1270, 1273 n. 3 (11th Cir. 2004) (describing a Taser); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1040 n. 1 (6th Cir.1992)(same).

After being tased, Chaney rolled over onto his back and attempted to sit up, but Officer Cute tased Chaney a second time and rolled him back onto his stomach. Officer Cute then placed his foot on Chaney's head and "squish[ed]" it on the pavement, "like he put out a cigarette," R14 at 13, which caused an abrasion on Chaney's cheek. Officer Cute placed the other handcuff on Chaney's loose hand. Chaney remained on the ground while other officers arrived at the scene. Chaney claims that he recalls an officer, apparently one of Officer Cute's superiors, arriving at the scene and telling Officer Cute that [Chaney] didn't need to be [t]ased any more." R3-65, Exh.1 at 19. Chaney was helped up from the ground and was led to a police cruiser.

At this point a crowd of onlookers had gathered at the Mercy Market. As the officers led Chaney to a police car, he asked a member of the crowd if she would call his mother and tell her what had happened to him. The bystander asked Chaney for his phone number. As Chaney began to answer, Officer Cute "grabbed . . . a pressure point in [Chaney's] throat by [his] Adam's apple," and told him "don't say a fucking word." R14 at 14. Officer Cute then slammed Chaney's head onto the trunk of the police cruiser.

Chaney was subsequently taken to a location near the incident, for further questioning. Chaney testified that, en route, an officer in the cruiser asked him: "how did the fucking Taser feel?" R3-165, Exh. 1 at 23. After sitting in the cruiser for a short time.

Chaney was taken to a warehouse area, where he met with a Sergeant in the Orlando Police Department and was asked a series of questions about the tasing incident. The officers took pictures of Chaney's wounds; they removed the Taser hooks out of Chaney's back (they had been lodged in his back for approximately 15 minutes); and took detailed notes on Chaney's version of events. At that time, Chaney was informed that Officer Cute had stated that he had stopped Chaney because the rear license tag cover on the Grand Am had been obscured. Chaney disputed this allegation, telling the Sergeant that the license tag was not obscured. When Chaney was told that he was going to be taken to jail, he asked the Sergeant if he would personally transport him to the station, because he was uncomfortable riding in the same car with Officer Cute. Chaney was informed, however, that, as the arresting officer, Officer Cute was required to take him to the station.

Officer Cute transported Chaney to the Orange County Correctional Facility without incident. Chaney was given a traffic citation for operating a vehicle with an obscured license plate, in violation of Fla. Stat. § 316.605.[2] He was also charged with the

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[2]That provision states, in pertinent part, that "all letters, numerals, printing, writing, and other identification marks upon the [license] plates regarding the word 'Florida,' the registration decal, and te alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times 100 feet from the rear or front. Nothing shall be

misdemeanor offense of resisting an officer without violence, in violation of Fla. Stat. § 843.02.[3]

A traffic court later found Chaney not guilty of driving with an obscured license. The charge for resisting an officer without violence was *nolle prossed.*

In March 2004, Chaney brought the present § 1983 action in the Ninth Judicial Circuit of Orange County, Florida against Officer Cute and the City of Orlando. Chaney's amended complaint alleged claims against Officer Cute for wrongful arrest, excessive force, and malicious prosecution in pursing the traffic violation, all in violation of Chaney's Fourth Amendment rights. He also lodged three counts against the City fo Orlando, alleging that the excessive use of Tasers by Orlando police officers was an official custom or policy of the Department; that the Department failed to properly train its officers in the use of Tasers; and that the Department failed to monitor officers who used Tasers in an excessive manner. The defendants removed the action to the Middle District of Florida.

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placed upon the face of a Florida plate except as permitted by law or by rule or regulation of a governmental agency . . . A violation of this subsection is a noncriminal traffic infraction, punishable as a nonmoving violation . . . ."

[3] That statute states that "[w]hoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree."

A four-day jury trial was held in March 2006. At the close of Chaney's case-in-chief, Officer Cute moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court denied that motion. Officer Cute renewed this motion at the close of all of the evidence. The court reserved a ruling on that motion, and submitted the case to the jury.

After reading the jury its instructions, the court directed the jury to make findings on a special verdict form. The special verdict form contained a number of specific issues for the jury to decide. The jury made the following pertinent findings. First, the jury found that Officer Cute "reasonably believed that the tag of the vehicle drive by [Chaney] was obstructed in violation of Florida law when he stopped [Chaney]." R9-152 at 1. Second, the jury found that Officer Cute "reasonably believed that [Chaney] resisted his lawful directives or attempted arrest." *Id.* Third, the jury found that Officer Cute "intentionally committed acts that violated [Chaney]'s federal constitutional right not to be subjected to excessive force" both in effecting the arrest of Chaney and in tasing him. *Id.* At 2. Fourth, the jury found that Officer Cute "acted with malice in pursuing the traffic citation against [Chaney]." *Id.* Separately, the jury found that the City of Orlando did not have any "custom or policy that resulted in the constitutional violations" that Chaney suffered at the hands of Officer Cute. *Id.*

The jury then imposed nominal damages

($972.15) to compensate for the cost of Chaney's post-incident medical treatment; for his bond; and for his having to defend against the traffic citation. *Id.* At 3. The jury also imposed punitive damages against Officer Cute in the amount of $100,000, based on its finding that Officer Cute had acted with malice or reckless indifference to Chaney's rights. *Id.* After the verdict, Officer Cute made a renewed motion for judgment as a matter of law pursuant to Rule 50(b), based on a theory of qualified immunity. Separately, Officer Cute moved for a new trial, pursuant to Rule 59, on the basis of qualified immunity, alleged inconsistencies in the jury verdict, and the contention that the punitive damages award was excessive.

The district court addressed Officer Cute's renewed motion for judgment as a matter of law in a detailed order. With respect to Chaney's wrongful arrest count, the court observed that "[t]he jury found that Officer Cute reasonably believed that [Chaney] resisted Officer Cute's lawful directives or attempted arrest." R9-165 at 11. The court reasoned that because an arrest supported by probable cause is, by law, not a "wrongful arrest" in violation of the Fourth Amendment,[4] and because, according to the court, the jury's verdict had made clear that Officer Cute had probable cause to arrest Chaney for resisting, the court concluded that Chaney's wrongful arrest claim

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[4] *See, e.g. Atwater v. City of Largo Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

failed. The court then granted Officer Cute judgment as a matter of law on that count.

With respect to Chaney's excessive force count, the court noted that the jury had concluded that Officer Cute had probable cause to arrest Chaney, but had nevertheless fond that the force used by Chaney was excessive. The court observed, however, that it was obligated to determine whether Chaney was entitled to qualified immunity as a matter of law on the excessive force count. The court thus applied the two-part analysis set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), assessing whether the facts alleged, taken in the light most favorable to the party asserting the injury, showed that the officer's conduct violated a constitutional right, and, if so, whether that right was clearly established under federal law.

Applying the *Saucier* analysis, the court first suggested that it was unclear whether Officer Cute's conduct was excessive as a matter of law, or whether it was *de minimis* so as to fail to implicate Chaney's Fourth Amendment rights.[5] The court then reverted to the fact that "the jury concluded that Officer Cute had probable cause and the authority to make the arrest," and stated that "[t]he authority to make an arrest permits an officer to use reasonable force." R9-

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[5] *See Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000) ("[T]he application of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment.") (alteration added).

165 at 18. In light of the jury finding that probable cause existed, the court concluded that the force used by Officer Cute in connection with a lawful arrest was reasonable under the circumstances, and that therefore Chaney's constitutional rights had not been violated.

As to the second step of the *Saucier* framework – whether the right not to be tasered was clearly established – the court found that there was no case law in this circuit recognizing such a right. And with respect to a more general right to be free from excessive force at the hands of police officers, the court reiterated that the jury had found that Officer Cute had probable cause to make his arrest, and that, "consequently," the force used was reasonable under the circumstances. As a result, the court concluded that Officer Cute was entitled to qualified immunity on Chaney's excessive force count, and granted Officer Cute's renewed motion for judgment as a matter of law.

Finally, with respect to the malicious prosecution count based on Chaney's alleged traffic violation, the court again concluded that the jury had found that Officer Cute had probable cause to effectuate the traffic stop, and that, because a malicious prosecution action under Florida law requires an absence of probable cause, [6] Chaney's malicious prosecution count was not viable. Relying

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[6] *See Kingland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004) (applying Florida law).

on the jury's finding that Officer Cute had probable cause, the court granted Officer Cute's renewed motion for judgment as a matter of law on the malicious prosecution count.

After granting Officer Cute's renewed motion for judgment as a matter of law on the three counts pending against him, the district court then entered final judgment in favor of Officer Cute and the City of Orlando.[7] The court never addressed the alternative motion for a new trial. This appeal followed.

II. DISCUSSION

A. *District Court's Order Granting Officer Cute Judgment as a Matter of Law*

[1] Chaney argues that the district court erred in granting Officer Cute's renewed motion for judgment as a matter of law. We review a district court's ruling on a motion for judgment as a matter of law *de novo*. *See Doe v. Celebrity Cruises, Inc.*, 394

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[7] Defendant-Appellee City of Orlando did not file a motion for judgment as a matter of law in this case. The district court's entry of final judgment in favor of the City of Orlando – based on the jury's express finding in Interrogatory # 6 that there was no custom or policy in place that condoned excessive force by Orlando police officers – has not been appealed, nor is it implicated by our review of the court's analysis as to Officer Cute's Rule 50(b) motion. Thus, our decision addresses the court's decision to grant Officer Cute's renewed motion for judgment as a matter of law; we do not disturb the court's separate entry of final judgment in favor of the City of Orlando.

F.3d 891, 902 (11th Cir.2004) (citation omitted). Under Rule 50, "[a] party's motion for judgment as a matter of law can be granted at the close of evidence or, if timely renewed, after the jury has returned its verdict, as long as "there is no legally sufficient evidentiary basis for a reasonable jury to find'" for the non-moving party. *Lipphardt v. Durango Steakhouse of Brandon, Inc.* , 267 F.3d 1183, 1186 (11th Cir.2001) (citing Fed. R.Civ.P. 50).

Regardless of timing, however, in deciding on a Rule 50 motion a district court's proper analysis is squarely and narrowly focused on the sufficiency of evidence. The question before the district court regarding a motion for judgment as a matter of law remains whether the evidence is "legally sufficient to find for the party on that issue," Fed.R.Civ.P. 50(a)(1), regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192 (11th Cir.2004) (stating that judgment as a matter of law should only be granted "when there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue"); *Arthur Pew Constr. Co. V. Lipscomb*, 965 F.2d 1559, 1563 (11th Cir.1992) (stating that the "usual inquiry" under Rule 50 is "sufficiency, i.e. whether the evidence was sufficient to submit [the issue] to the jury"); *see also 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 2537 (2d. ed.1995) (stating that "[t]he standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is

precisely the same as the standard for granting the pre-submission motion [under 50(a)]"). Accordingly, we have stated that in ruling on a party's renewed motion under Rule 50(b) after the jury has rendered a verdict, a court's sole consideration of the jury verdict is to assess whether that verdict is supported by sufficient evidence. *See Lipphardt*, 267 F.3d at 1196 (citation omitted); *Arthur Pew*, 965 F.2d at 1563.

In this case, the jury rendered a verdict in Chaney's favor, awarding $100,000 in damages based on its finding that Officer Cute had noted with malice or reckless indifference to Chaney's rights. Subsequent to this verdict, Officer Cute renewed his motion for judgment as a matter of law on the basis of qualified immunity, having already made this argument at the close of Chaney's case and again at the close of all of the evidence.

In this case, the district court, in ruling on Officer Cute's renewed motion for judgment as a matter of law, effectively based its conclusions on the jury findings contained in the special verdict form. In discussing Chaney's count for wrongful arrest, for example, the court observed that the *jury* had found that Officer Cute had probable cause that Chaney was resisting arrest, and then stated, "[s]ince Officer Cute had probable cause [Chaney]'s cause of action for false arrest fails." R9-165 at 11. Likewise, in discussing Chaney's claim for excessive force, the court again observed the *jury* had found that Officer Cute had probable cause to arrest Chaney, and that

therefore Officer Cute was entitled to use a reasonable amount of force in connection with that arrest. *Id.* At 18, 23. In light of the jury's finding that probable cause existed–as well as the court's separate conclusion that the force used was reasonable under the totality of the circumstances–the court granted qualified immunity to Officer Cute on the excessive force count. Finally, in assessing Chaney's malicious prosecution count, the court once again observed that the *jury* had found that Officer Cute had probable cause to effectuate the traffic stop. Relying on the jury finding that there was probable cause to initiate the traffic stop, the court concluded that Chaney's malicious prosecution claim also failed as a matter of law. *Id.* at 12.

[2] The court's order granting Officer Cute's renewed motion for judgment as a matter of law was predicated almost entirely on the special findings that the jury had made on the verdict form, and not on an assessment of whether there was sufficient evidence from which a reasonable jury could have rendered a verdict in Chaney's favor. The court based its conclusions–in whole or in part–on the jury's determination that Officer Cute had acted with probable cause. In doing so, the court failed to comport with the proper legal standard for ruling on a motion pursuant to Rule 50 and impermissibly credited the jury's findings.

The fact that Rule 50(b) uses the word "renew[ed]" makes clear that a Rule 50(b) motion should be decided in the same way it would have

been decided prior to the jury's verdict, and that the jury's particular findings are not germane to the legal analysis. *See, e.g., Celebrity Cruises*, 394 F.3d at 903 ("This Court repeatedly has made clear that any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury."); *Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996) (stating that a Rule 50(b) motion "may be used to renew consideration of issues initially raised in a pre-verdict motion [under Rule 50(a)]," but that the court cannot consider matters not raised in the initial motion). The jury's findings should be excluded from the decision-making calculus on a Rule 50(b) motion, other than to ask whether there was sufficient evidence, as a legal matter, from which a reasonable jury could find for the party who prevailed at trial.

Here, in ruling on Officer Cute's renewed motion under Rule 50(b), the court should have limited its inquiry as to whether there was sufficient evidence in the record to support a jury's finding of excessive force and its imposition of liability on Officer Cute. By placing an undue emphasis on the jury's particular findings as to probable cause–and by repeatedly making decisions on the Rule 50 motion through the lens of what the jury found–the court engaged in an erroneous analysis in deciding Officer Cute's renewed motion for judgment as a matter of law. As a result, we conclude that the analysis of

district court's judgment granting Officer Cute judgment as a matter of law was flawed and that the judgment must be reversed. We remand this case to permit the district court to address Officer Cute's renewed motion in a manner consistent with this opinion.

B. *District Court's Failure to Decide Officer Cute's Motion for a New Trial*

The district court also failed to rule on Officer Cute's motion for a new trial pursuant to Rule 50 of the Federal Rules of Civil Procedure. Officer Cute's motion sought a new trial on the basis of qualified immunity, as well as on the grounds that the verdict was inconsistent and the punitive damages award was excessive.

[3] Rule 50, which permits a party to "alternatively request a new trial" in connection with a motion for judgment as a matter of law, Fed.R.Civ.P. 50(b), makes clear that

> [i]f the renewed motion for judgment as a matter of law is granted, the court *shall also rule on the motion for a new trial, if any,* by determining whether it should be granted if the judgment is thereafter vacated or reversed, and *shall specify the grounds for granting or denying the motion for the new trial.*

Fed.R.Civ.P. 50(c)(1) (emphasis added). By its plain

language, the Rule obligates the court to rule on a motion for a new trial when issuing its ruling on a renewed motion for judgment as a matter of law. Here, the district court failed to do so. Thus we also remand this case to permit the district court to properly consider not only Officer Cute's renewed motion for judgment as a matter of law but also Officer Cute's separate motion for a new trial.

III. CONCLUSION

Chaney appealed the district court's judgment as to Officer Cute, contending that the district court erred in granting Officer Cute judgment as a matter of law under Rule 50(b). Having reviewed the district court's opinion, we conclude that the district court used an improper legal analysis in deciding Officer Cute's renewed motion for judgment as a matter of law. Specifically, we conclude that the district court's decision placed an undue weight on the findings of the jury as to probable cause. Because a reliance on the findings of the jury was incompatible with the proper standard for deciding a Rule 50 motion, we REVERSE the judgment in favor of Officer Cute and REMAND this case for the district court to consider the merits of Officer Cute's renewed motion in a manner consistent with this opinion. In addition, because the district court failed to rule on Officer Cute's motion for a new trial as mandated by Rule 50(c)(1), we REMAND this case for the district court to address the merits of Officer Cute's motion for a new trial.

U.S. Court of Appeals, Eleventh Circuit–Thomson

West, Saint Paul, Minn.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit

By: s/_____
Deputy Clerk
Atlanta, Georgia

C-23

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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May 11, 2007

Sheryl L. Loesch
Clerk, U.S. District Court
401 W CENTRAL BLVD STE 1-200
Orlando FL 32801-0120

Appeal Number: 06-12647-HH
Case Style: Dontray Chaney v. City of Orlando, FL
District Court Number: 04-00515 CV-ORL-22KRS

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

Bill of Costs
Original Exhibits, consisting of: two folders
Original record on appeal or review, consisting of seventeen volumes

9VP
8 tnscpt
3 Fexhb

The clerk of the court or agency shown above is

requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: James O. Delaney
(404) 335-6113

Encl.

APPENDIX D

DISTRICT COURT ORDER

DATED AUGUST 15, 2007

D-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONTRAY CHANEY,

Plaintiff,

-vs- Case No. 6:04-cv-515-Orl-22KRS

CITY OF ORLANDO, FLORIDA and
JONATHAN CUTE,

Defendants.

ORDER

I. INTRODUCTION

This cause comes before the Court through remand from the Eleventh Circuit for reconsideration of Defendant's, Jonathan Cute, Motion to Set Aside Verdict (Doc. 158), filed March 10, 2006, to which Plaintiff, Dontray Chaney, has responded (Doc. 162); and Defendant's Motion for new trial or to alter or amend judgment (Doc. 160), filed March 10, 2006, to which Plaintiff has responded (Doc. 161). After a careful review of the parties submissions and the Eleventh Circuit's opinion, the Court GRANTS Defendant's Motion to Set Aside Verdict (Doc. 158) and DENIES Defendant's Motion for new trial or to

alter or amend judgment (Doc. 160).

II. BACKGROUND

In its opinion, remanding this case to the Court, the Eleventh Circuit was meticulous in its recitation of the facts and this Court adopts those facts:

> The evidence adduced at trial, which we must view in a light most favorable to Chaney as the party against whom judgment was entered a matter of law, is as follows. In the early evening of 5 June 2003, Chaney was en route to Mercy Market, a convenience store located at 1430 Mercy Drive in Orlando, to pick up a few items. Chaney was driving a 1996 Pontiac Grand Am that belonged to his cousin, Antawain Green. The Grand Am had a plastic cover over the vehicle's rear license tags. After Chaney made a right turn onto Mercy Drive from the Palms Apartment complex, Officer Cute stopped him. Officer Cute illuminated his police cruiser's blue lights, and Chaney pulled the Grand Am into the parking lot of the Mercy Market and placed it in park.
>
> After stopping the vehicle, Chaney opened his car door and began to exit

the vehicle in an attempt to ascertain the reason for the traffic stop. At that time Chaney was holding his license in his hand. As Chaney was stepping out of the car, Officer Cute, who was approximately four to five feet away and was fast approaching, told Chaney to "get back in the fucking car." R14 at 8; R3-65, Exh. 1 at 13. Chaney then sat back down in the driver's seat, placed his feet back inside the vehicle with the driver side door still "cracked," and placed his hands in his lap with his driver's license in his hand. Chaney asked Officer Cute the reason for the stop, but instead of answering him, Officer Cute reached into the vehicle to pull the keys out of the car's ignition. Chaney attempted to stop Officer Cute by placing his hand over the ignition, and asked the officer what he was doing. Officer Cute then grabbed Chaney's arm and twisted it behind his back, grabbed Chaney by the neck in a "choke hold," and pulled Chaney out of the car. R14 at 9; R3-65, Exh. 1 at 15.

After pulling Chaney out of the vehicle, Officer Cute dropped Chaney to the ground and placed his knee between Chaney's shoulder blades in an attempt to pin Chaney on his stomach. Officer Cute placed one of Chaney's hands in

handcuffs. Officer Cute then held a "Taser"[1] to Chaney's head and asked Chaney: "do [you] want some?" R14 at 10. Chaney testified that he did not attempt to resist arrest or struggle with Officer Cute while he was pinned to the ground, but that he again asked Officer Cute what he was doing. At this time, only one of Chaney's hands had been placed in handcuffs; Chaney's other hand was still loose. Officer Cute then stood up and, with Chaney still pinned on the ground, tased him. Chaney testified that being tased caused him to lose control over his body, and that he "felt like [he] was going to die." R3-65, Exh.1 at 17-18.

1. The term "Taser" refers to an electronic device used to subdue persons without causing fatal harm. A Taser is a battery-charged unit approximately the size and appearance of a flashlight. It holds two replaceable cartridges, each containing a hooked barb, or dart, attached to the cartridge by a long, electricity-conducting insulated wire. Each dart can be fired independently by depressing the corresponding lever located on the frame of the Taser. When the probes make contact with the

> target, the Taser transmits high voltage electrical current along the wires and into the body of the target. In addition, after the Taser's initial "shot" has been fired and contact has been made, an electrical current may be transmitted through the wire to the target by repeatedly pressing on the Taser's lever. *See Draper v. Reynolds*, 369 F.3d 1270, 1273 n. 3 (11th Cir. 2004) (describing a Taser); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1040 n. 1 (6th Cir.1992) (same).

After being tased, Chaney rolled over onto his back and attempted to sit up, but Officer Cute tased Chaney a second time and rolled him back onto his stomach. Officer Cute then placed his foot on Chaney's head and "squish[ed]" it on the pavement, "like he put out a cigarette," R14 at 13, which caused an abrasion on Chaney's cheek. Officer Cute placed the other handcuff on Chaney's loose hand. Chaney remained on the ground while other officers arrived at the scene. Chaney claims that he recalls an officer, apparently one of Officer Cute's superiors, arriving at the scene and telling Officer Cute that [Chaney] didn't need to be [t]ased any more." R3-65, Exh.1 at 19. Chaney

was helped up from the ground and was led to a police cruiser.

At this point a crowd of onlookers had gathered at the Mercy Market. As the officers led Chaney to a police car, he asked a member of the crowd if she would call his mother and tell her what had happened to him. The bystander asked Chaney for his phone number. As Chaney began to answer, Officer Cute "grabbed . . . a pressure point in [Chaney's] throat by [his] Adam's apple," and told him "don't say a fucking word." R14 at 14. Officer Cute then slammed Chaney's head onto the trunk of the police cruiser.

Chaney was subsequently taken to a location near the incident, for further questioning. Chaney testified that, en route, an officer in the cruiser asked him: "how did the fucking Taser feel?" R3-165, Exh. 1 at 23. After sitting in the cruiser for a short time. Chaney was taken to a warehouse area, where he met with a Sergeant in the Orlando Police Department and was asked a series of questions about the tasing incident. The officers took pictures of Chaney's wounds; they removed the Taser hooks out of Chaney's back (they had been lodged in his back for

approximately 15 minutes); and took detailed notes on Chaney's version of events. At that time, Chaney was informed that Officer Cute had stated that he had stopped Chaney because the rear license tag cover on the Grand Am had been obscured. Chaney disputed this allegation, telling the Sergeant that the license tag was not obscured. When Chaney was told that he was going to be taken to jail, he asked the Sergeant if he would personally transport him to the station, because he was uncomfortable riding in the same car with Officer Cute. Chaney was informed, however, that, as the arresting officer, Officer Cute was required to take him to the station.

Officer Cute transported Chaney to the Orange County Correctional Facility without incident. Chaney was given a traffic citation for operating a vehicle with an obscured license plate, in violation of Fla. Stat. § 316.605.[2] He was also charged with the misdemeanor offense of resisting an officer without violence, in violation of Fla. Stat. § 843.02.[3] A traffic court later found Chaney not guilty of driving with an obscured license. The charge for resisting an officer without violence was *nolle prossed*.

2. That provision states, in pertinent part, that "all letters, numerals, printing, writing, and other identification marks upon the [license] plates regarding the word 'Florida,' the registration decal, and te alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times 100 feet from the rear or front. Nothing shall be placed upon the face of a Florida plate except as permitted by law or by rule or regulation of a governmental agency . . . A violation of this subsection is a noncriminal traffic infraction, punishable as a nonmoving violation . . . ."

3. That statute states that "[w]hoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree."

In March 2004, Chaney brought the

present § 1983 action in the Ninth Judicial Circuit of Orange County, Florida against Officer Cute and the City of Orlando. Chaney's amended complaint alleged claims against Officer Cute for wrongful arrest, excessive force, and malicious prosecution in pursing the traffic violation, all in violation of Chaney's Fourth Amendment rights. He also lodged three counts against the City fo Orlando, alleging that the excessive use of Tasers by Orlando police officers was an official custom or policy of the Department; that the Department failed to properly train its officers in the use of Tasers; and that the Department failed to monitor officers who used Tasers in an excessive manner. The defendants removed the action to the Middle District of Florida.

A four-day jury trial was held in March 2006. At the close of Chaney's case-in-chief, Officer Cute moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court denied that motion. Officer Cute renewed this motion at the close of all of the evidence. The court reserved a ruling on that motion, and submitted the case to the jury.

After reading the jury its instructions, the court directed the jury to make findings on a special verdict form. The special verdict form contained a number of specific issues for the jury to decide. The jury made the following pertinent findings. First, the jury found that Officer Cute "reasonably believed that the tag of the vehicle drive by [Chaney] was obstructed in violation of Florida law when he stopped [Chaney]." R9-152 at 1. Second, the jury found that Officer Cute "reasonably believed that [Chaney] resisted his lawful directives or attempted arrest." *Id.* Third, the jury found that Officer Cute "intentionally committed acts that violated [Chaney]'s federal constitutional right not to be subjected to excessive force" both in effecting the arrest of Chaney and in tasing him. *Id.* At 2. Fourth, the jury found that Officer Cute "acted with malice in pursuing the traffic citation against [Chaney]." *Id.* Separately, the jury found that the City of Orlando did not have any "custom or policy that resulted in the constitutional violations" that Chaney suffered at the hands of Officer Cute. *Id.*

The jury then imposed nominal damages ($972.15) to compensate for the cost of Chaney's post-incident

medical treatment; for his bond; and for his having to defend against the traffic citation. *Id.* At 3. The jury also imposed punitive damages against Officer Cute in the amount of $100,000, based on its finding that Officer Cute had acted with malice or reckless indifference to Chaney's rights. *Id.* After the verdict, Officer Cute made a renewed motion for judgment as a matter of law pursuant to Rule 50(b), based on a theory of qualified immunity. Separately, Officer Cute moved for a new trial, pursuant to Rule 59, on the basis of qualified immunity, alleged inconsistencies in the jury verdict, and the contention that the punitive damages award was excessive.

The district court addressed Officer Cute's renewed motion for judgment as a matter of law in a detailed order. With respect to Chaney's wrongful arrest count, the court observed that "[t]he jury found that Officer Cute reasonably believed that [Chaney] resisted Officer Cute's lawful directives or attempted arrest." R9-165 at 11. The court reasoned that because an arrest supported by probable cause is, by law, not a "wrongful arrest" in violation of the Fourth Amendment,[4] and because, according to the court, the

jury's verdict had made clear that Officer Cute had probable cause to arrest Chaney for resisting, the court concluded that Chaney's wrongful arrest claim failed. The court then granted Officer Cute judgment as a matter of law on that count.

4. *See, e.g. Atwater v. City of Largo Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

With respect to Chaney's excessive force count, the court noted that the jury had concluded that Officer Cute had probable cause to arrest Chaney, but had nevertheless fond that the force used by Chaney was excessive. The court observed, however, that it was obligated to determine whether Chaney was entitled to qualified immunity as a matter of law on the excessive force count. The court thus applied the two-part analysis set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), assessing whether the facts alleged, taken in the light most favorable to the party asserting the injury, showed that the officer's conduct violated a constitutional right, and, if so, whether that right was clearly established under federal law.

Applying the *Saucier* analysis, the court first suggested that it was unclear whether Officer Cute's conduct was excessive as a matter of law, or whether it was *de minimis* so as to fail to implicate Chaney's Fourth Amendment rights.[5] The court then reverted to the fact that "the jury concluded that Officer Cute had probable cause and the authority to make the arrest," and

stated that "[t]he authority to make an arrest permits an officer to use reasonable force." R9-165 at 18. In light of the jury finding that probable cause existed, the court concluded that the force used by Officer Cute in connection with a lawful arrest was reasonable under the circumstances, and that therefore Chaney's constitutional rights had not been violated.

> 5. *See Nolin v. Isbell* , 207 F.3d 1253, 1257 (11th Cir. 2000) ("[T]he application of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment.") (alteration added).

As to the second step of the *Saucier* framework – whether the right not to be tasered was clearly established – the court found that there was no case law in this circuit recognizing such a right. And with respect to a more general right to be free from excessive force at the hands of police officers, the court reiterated that the jury had found that Officer Cute had probable cause to make his arrest, and that, "consequently," the force used was reasonable under the circumstances.

As a result, the court concluded that Officer Cute was entitled to qualified immunity on Chaney's excessive force count, and granted Officer Cute's renewed motion for judgment as a matter of law.

Finally, with respect to the malicious prosecution count based on Chaney's alleged traffic violation, the court again concluded that the jury had found that Officer Cute had probable cause to effectuate the traffic stop, and that, because a malicious prosecution action under Florida law requires an absence of probable cause,[6] Chaney's malicious prosecution count was not viable. Relying on the jury's finding that Officer Cute had probable cause, the court granted Officer Cute's renewed motion for judgment as a matter of law on the malicious prosecution count.

6. *See Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004) (applying Florida law).

After granting Officer Cute's renewed motion for judgment as a matter of law on the three counts pending against him, the district court then entered final judgment in favor of Officer Cute and the City of Orlando.[7] The court never addressed the alternative motion

for a new trial. This appeal followed.

> 7. Defendant-Appellee City of Orlando did not file a motion for judgment as a matter of law in this case. The district court's entry of final judgment in favor of the City of Orlando – based on the jury's express finding in Interrogatory # 6 that there was no custom or policy in place that condoned excessive force by Orlando police officers – has not been appealed, nor is it implicated by our review of the court's analysis as to Officer Cute's renewed motion for judgment as a matter of law; we do not disturb the court's separate entry of final judgment in favor of the City of Orlando.

Chaney v. City of Orlando, 483 F.3d 1221, 1222-27 (11th Cir. 2007). The Eleventh Circuit, determining this Court erred in its Rule 50 analysis, stated that the proper Rule 50 analysis focuses solely and specifically on the sufficiency of evidence and that this Court improperly based its conclusions as to Plaintiff's claims against Defendant Cute–wrongful arrest, excessive force, and malicious prosecution–, on jury findings from the special verdict form. *Id.* at 1227. The Eleventh Circuit reasoned that this Court placed undue emphasis on the jury's findings, and, therefore, engaged in an erroneous analysis in

deciding Defendant Cute's renewed motion for judgment as a matter of law. *Id.* at 1228. Additionally, the appellate court determined this Court erred by not ruling on Defendant Cute's Rule 59 motion for a new trial. *Id.*

III. LEGAL ANALYSIS

After studying the appellate court decision and reviewing both this Court's April 7, 2006, Order for Judgment ("Prior Order") and the parties' legal memoranda on the issue, the Court has determined that the fundamental error of its Prior Order was one of clarity. The Prior Order did not clearly convey to the Eleventh Circuit the resolution of the claims against Defendant Cute. In its December 2, 2005 Order on Summary Judgment, the Court determined three counts against Defendant Cute– wrongful arrest, excessive force, and malicious prosecution– would proceed to trial. Doc. 103 at 39. Of those three, the Court only decided the excessive force count on Defendant Cute's Rule 50 motion; the wrongful arrest and malicious prosecution counts were decided against Plaintiff by the jury.

A. Jury's Determination of the Wrongful Arrest and Malicious Prosecution Counts

Following a four day trial the jury returned findings, regarding the claims against Officer Cute, on its Jury Verdict (Doc. 152). The first finding was that Officer Cute reasonably believed that the tag of the vehicle driven by Chaney was obstructed in

violation of Florida law when Officer Cute stopped Chaney. Second, Officer Cute reasonably believed that Chaney resisted his lawful directives or attempted arrest. Third, Officer Cute intentionally committed acts that violated Chaney's federal constitutional right not to be subjected to excessive force during an arrest by using unreasonable force in effecting the arrest of Chaney and using unreasonable force when he tased Chaney. Fourth, Officer Cute acted with malice in pursuing the traffic citation against Chaney. Fifth, the jury found that Officer Cute's acts were the proximate cause or legal cause of damages sustained by Chaney. Sixth, any of the aforementioned acts were a proximate or legal cause of the damages sustained by Chaney. The jury went on to make findings in regard to damages. It awarded, against Officer Cute, $511.17 for medical care, $460.98 for compensatory damages, and $100,000 in punitive damages to Chaney. In sum, the jury, through its verdict, decided the wrongful arrest and malicious prosecution counts against Plaintiff and the excessive force count against Defendant Cute.

After the jury handed down its verdict, Defendant Cute filed a motion to set aside the verdict (Doc. 158). Officer Cute claimed that he was entitled to judgment as a matter of law on the issues of excessive force, malicious prosecution, and punitive damages. Officer Cute claims that there was legally insufficient evidence for a reasonably jury to find for Chaney on any of the issues. Specifically regarding the counts of excessive force and malicious

prosecution, Officer Cute additionally contended that he was immune to liability because he was entitled to qualified immunity.

In his response (Doc. 162) to Officer Cute's motion, Chaney improperly raised new issues regarding the of the jury verdict form. In retrospect, the Court should have ignored or stricken Chaney's Response (Doc. 162) to Defendant Cute's Motion for Judgment because it was really a motion for relief. If Chaney wanted certain findings from the jury verdict stricken then he should have filed a motion seeking such relief, which he never did. Instead, Chaney's request for relief from the verdict was improperly embedded in his Response. *See Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (finding "[w]here a request for leave to file an amended complaint simply is embedded within an opposition memorandum, the issue has not been raised properly"). The Court decided to address the issues Chaney raised anyway and demonstrate to Chaney that even if he had filed a Motion to Strike it would not have been granted.

First, Chaney claimed that the jury should not have considered the issue of probable cause to pull Chaney over because the Court had decided the issue on summary judgment. Plaintiff argued that the initial stop was invalid, stating that the rear license plate on the Grand AM was never obstructed. At summary judgment, Plaintiff submitted a photograph of the tag taken by the owner of the Grand AM, Antawain Green. The photograph was taken,

according to the affidavit of Green, immediately after the police released the car to him.[1] Based solely on the appearance of the tag in the picture, the Court found on summary judgment that no reasonable officer could have concluded that the license tag was obscured in violation of Florida Statute § 316.605. [2] Section 316.605 requires that license plates be free from any "obscuring matter[] so that they will be plainly visible and legible at all times 100 feet from the rear or front." Fla. Stat. § 316.605(1). This Court agreed with Plaintiff at summary judgment and found for Plaintiff, deciding that there was no genuine issue of material fact on this point.

Inexplicably, Plaintiff decided to re-litigate the obstructed tag issue at trial. First, Plaintiff argued during opening statement that the tag was not obstructed and that the evidence would demonstrate as much. Then Plaintiff allowed testimony in his case-in-chief that created a jury issue regarding the tag. After Plaintiff called Officer Cute to the stand, he described how he not only was unable to read the numbers on the license plate from 100 feet away, but that he had difficulty reading the numbers from within ten feet. Doc. 171 at 122. The owner of the Grand Am presented new evidence during his testimony. He testified that he took the picture of the license plate the day after the arrest, not at the towing yard, but later that day at his house. Doc. 171

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[1] Green Aff. (Doc. 75-7)

[2] Summ. J. Order (Doc. 103).

at 38. The owner then stated that the Grand Am had been pulled over before this incident for a possible obstructed tag violation. *Id.* Sergeant Klem also testified during Plaintiff's case that the tag on the Grand Am did not look like the one in the picture. *Id.* at 182. With Plaintiff's implicit consent to try the issue and the new evidence presented in Plaintiff's case as to whether the tag was obstructed, the question became an issue to be determined by the jury. The jury found that Officer Cute reasonably believed that the tag of the Grand Am was obstructed in violation of Fla. Stat. § 316.605(1).

In his Response to Defendant's post-verdict Rule 50 motion, Plaintiff sought to have the Court ignore this finding because the Court had already ruled on the issue at summary judgment. It was Plaintiff who ignored the fact that Plaintiff resurrected this issue by allowing conflicting evidence on this issue to be introduced during his case in chief. Plaintiff reviewed the first question on the jury verdict form and raised no objection before the Court submitted it to the jury. Doc. 173 at 4. Only after the jury ruled against Plaintiff, did Plaintiff ask the Court to act as if the issue was never submitted to the jury. This issue was tried by consent of Plaintiff. The jury finding regarding the stop is important because it gave the jury a reasonable basis for finding probable cause to make the arrest.

The Charging Affidavit (Pl. ex. 21) shows that Chaney was charged with "resisting without violence"

pursuant to Fla. Stat. § 843.02. Section 843.02 reads, in pertinent part:

> Whoever shall resist, obstruct, or oppose any officer . . . or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

A plain reading of the statute shows that this provision is applicable to persons resisting, obstructing, or opposing any officer in the lawful execution of any legal duty, not solely in the lawful execution of an arrest. The jury found that Officer Cute reasonably believed that Plaintiff resisted Officer Cute \'s lawful directives or attempted arrest. A reasonable belief is enough to create probable cause. *Durruthy*, 351 F. 3d at 1090. Since Officer Cute had probable cause Plaintiff's cause of action for false arrest fails.

Likewise, the jury also found against Chaney on the malicious prosecution count. "To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures." *Kingsland*, 382 F.3d 1220,

1234 (11th Cir. 2004) (citing *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003)). Florida law requires that six elements be established to prove a claim of malicious prosecution:

> (1) an original judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present Defendant; and (6) the plaintiff suffered damages as a result of the original proceeding.

Id. (citing *Durkin* v. *Davis*, 814 So. 2d 1246, 1248 (Fla. 2d DCA 2002)).

The jury found that Officer Cute had a reasonable belief to effect both the traffic stop and the arrest based on Plaintiff resisting his arrest. *Id.* Officer Cute had probable cause to effect Plaintiff's arrest. A valid claim for malicious prosecution must meet all six of these elements. *Kingsland*, 382 F.3d at 1234. Since Plaintiff did not establish the fourth element his claim for malicious prosecution fails. Officer Cute is entitled to judgment on this claim.

The jury's first two findings effectively concluded that Officer Cute did not wrongfully arrest or maliciously prosecute Chaney. Chaney contested the propriety of the jury deciding these issues in his response to Officer Cute's Rule 50 motion. The Court's discussion of these issues– prompted by Plaintiff– in this Order and the Prior Order are clarifications of the jury's determinations of these counts.

When reconsidering this matter, the Court gained appreciation for the case law that suggests striking requests for relief embedded in responses to other motions. Apart from potentially depriving the opposing party from its due process right to be heard, the other problem is that new issues seeking relief presented in a response becloud the issues raised in the original motion. In the instant case, the core issue Defendant raised was his whether he has qualified immunity in the face of the jury finding that he used excessive force. Yet the Court could not address this point until it did away with the new issues raised by Defendant. Now the Court turns to Defendant's qualified immunity argument.

B. Excessive Force and Defendant's Motion for Qualified Immunity

The Eleventh Circuit's opinion in this case regarding a Rule 50 analysis juxtaposed against the teachings of the Eleventh Circuit on qualified immunity puts this Court in a quandary. The Court acknowledges the Eleventh Circuit's general rule,

which was clearly and thoroughly articulated in the *Chaney* opinion, that in a Rule 50 analysis the Court should focus squarely and narrowly "on the sufficiency of the evidence." 483 F.3d at 1227. However, qualified immunity is an exception to this general rule. As the case law of this Circuit teaches there are occasions when a district court must look to the jury's determinations to rule on a qualified immunity issue. In the instant case, the Eleventh Circuit gave no specific direction regarding the scope of the qualified immunity analysis through a Rule 50 motion in its opinion on this case; therefore, it would be improvident to ignore the Eleventh Circuit case law on qualified immunity.

Qualified immunity provides a complete defense from suit and from liability for government officials who are sued in their individual capacities for the performance of their discretionary functions. *See Storck*, 354 F.3d at 1313-14. Qualified immunity's protection exists as long as the official's conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 1313 (quoting *Lassiter v. Ala. A & M Univ., Bd. Of Trustees* , 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). The purpose of qualified immunity:

> is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from

> suit all but the plainly incompetent or one who is knowingly violating the federal law. Because qualified immunity is a defense not only from liability, but also from suit, it is important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible.

Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 1998) (internal citations and quotations omitted).

Qualified immunity should first be considered when the complaint is filed. If it is unclear that the defendant is entitled to qualified immunity from the complaint alone then the case should proceed to summary judgment. The Eleventh Circuit states, and this Court recognizes, that summary judgment is the normal "juncture at which the defendants are released from the threat of liability and the burden of further litigation." *Johnson v. Breeden*, 280 F.3d 1308, 1317 (11th Cir. 2002) (internal citations omitted). However, even at the summary judgment stage there may remain a genuine issue of material fact. Should the evidence at the summary judgment stage, viewed in a light most favorable to the plaintiff, demonstrate that "there are facts that are inconsistent with qualified immunity being granted[;] the case and the qualified immunity issue along with it will proceed to trial." *Id.*

Defendant may, again, raise the qualified immunity issue at the end of the plaintiff's case in

chief through a Fed. R. Civ. P. 50(a) motion. Typically, that motion would be denied because the evidence presented in the plaintiff's case in chief will be the same evidence that prevented the court from granting summary judgment. *See id.* at 1317-18. The defendant may re-assert the issue of qualified immunity after a jury verdict is entered. The Eleventh Circuit states:

> [i]t is important to recognize, however, that a defendant is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter a post-trial decision on the defense. When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.

Id. at 1318 (internal citations omitted). Should disputed facts remain after a jury has reached its verdict then, in deciding the qualified immunity issue, a court must view those facts in a light most favorable to the plaintiff. *Priester* v. *City of Rivera Beach, Fla.*, 208 F.3d 919, 926 n.3 (11 th Cir 2000) (internal quotations and citations omitted).

A qualified immunity analysis requires first that the public official prove that he or she "was acting within the scope of his [or her] discretionary function when the allegedly unconstitutional acts took place." *Storck*, 354 F.3d at 1314(quoting *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991)). In the instant case, both parties stipulate that Officer Cute was and currently is employed by the City of Orlando as a law enforcement officer in the Orlando Police Department and that he was acting in his official capacity at the time of all actions taken involving the Plaintiff.[3] Once it is established that the public official was acting within the scope of his or her discretionary authority, "the burden shifts to the plaintiff to establish that qualified immunity does not apply." *Id.*

To determine whether qualified immunity applies, the Court must first ask the threshold question of whether the facts adduced at trial, taken in the light most favorable to Plaintiff, show that Officer Cute's conduct violated a constitutional right. *See Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The Court must view the facts that are disputed in the Plaintiff's favor. *Priester*, 208 F.3d at 926 n.3. Next, if the evidence can be said to establish the violation of a constitutional right, the Court must determine whether that right was clearly established

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[3] Joint Pretrial Statement (Doc. 125) at 10.

at the time of the violation. *See id.*

Plaintiff alleges that Officer Cute used excessive force in effecting Chaney's arrest. Officer Cute asserts that he has qualified immunity on this claim. Before this Court could determine whether Officer Cute had qualified immunity it was necessary for the jury to decide two important historical facts: whether Officer Cute had probable cause to make the arrest and whether the force was excessive in fact. In the realm of qualified immunity the Court has an obligation to incorporate the jury's findings in its analysis. *Johnson*, 280 F. 3d at 1318. The jury concluded that Officer Cute had probable cause to arrest Chaney; additionally, it found that Officer Cute used excessive force in effecting the arrest as a matter of fact. With these findings the Court can fulfill its obligation, through its qualified immunity analysis, to determine if the force used by Officer Cute was so excessive that it violated clearly-established law. *See id. at 1317.*

1. Violation of a Constitutional Right-Excessive Force

"The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." *Duruthy*, 351 F.3d at 1093. "A court looks to the totality of the circumstances to determine whether the manner of arrest was reasonable." *Draper v. Reynolds*, 369 F.3d 1270, 1277 (11th Cir. 2004) (internal citations

omitted). The Court determined that it was unable to resolve this issue at summary judgment. The jury found that even though Officer Cute had probable cause to arrest Chaney, Officer Cute employed excessive force in effecting the arrest and violated Chaney's Fourth Amendment rights. Since Officer Cute infringed Plaintiff's constitutional rights, this Court now addresses the question of whether Officer Cute's application of force violated clearly established law.

2. Clearly Established Law

There are two different ways to demonstrate that the law "clearly established a particular amount of force was excessive." *Ferraro*, 284 F.3d at 1198. The first is to show that there is case law, decided prior to the instant case, showing that what the police officer did was unlawful. *Id.* "The burden of showing that an officer violated clearly established law falls on the plaintiff." *Jackson*, 206 F.3d at 1165. Qualified immunity will fail where, under existing case law, no reasonable officer in the defendant's situation would conclude that the force was lawful. *Id.* This method of proof can be difficult because the prior case must be factually similar enough to put the police officer on notice. *See Ferraro*, 284 F.3d at 1198-99.

For that reason the Eleventh Circuit recognizes a narrow exception "also allowing parties to show that the official's conduct lies to obviously at the very core of what the Fourth Amendment

prohibits that the unlawfulness of the conduct was readily apparent to the official notwithstanding the lack of case law." *Id.* at 1199 (internal quotations and citations omitted). Under this exception a plaintiff must show that the police officer's:

> conduct was so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without case law on point. This test entails determining whether application of [excessive force] standard would inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful.

Priester, 208 F.3d at 926 (internal quotations and citations omitted).

Viewed in the light most favorable to Plaintiff, the facts and circumstances in this case incident to Plaintiff's arrest are: (1) Officer Cute reached in the car in an attempt to take the keys out of the ignition; (2) Chaney placed his hands over the ignition and asked Officer Cute what he was doing; (3) Officer Cute then put Chaney's left arm behind Chaney's back, grabbed him by his neck, in a choke hold, and pulled him out of the car; (4) Officer Cute dropped him to the ground where Officer Cute then placed his knee between Chaney's shoulder blades in an attempt to pin Chaney on his stomach; (5) Officer Cute was initially able to only secure one of Chaney's

hands in handcuffs; (6) Officer Cute put a Taser to Chaney's head and asked him did he want some of it; (7) Officer Cute tased Chaney in the lower back; (8) Chaney rolled over, only to be rolled back by Officer Cute, and tased again; (10) then Officer Cute stepped on Chaney's head causing Chaney's face to rub against the pavement as if Officer Cute were squishing a cigarette; and (11) after Chaney was in both handcuffs Officer Cute grabbed Chaney by the throat and slammed his head down on the trunk of the police cruiser as Chaney tried to communicate with a crowd of bystanders.

Although the Court must consider the facts and circumstances in the light most favorable to Plaintiff, the Court cannot ignore other factors involved in the arrest. The incident took place at night. Traffic stops are one of the most dangerous activities that police officers undertake. Doc. 171 at 185. Officer Cute was alone. A routine stop was quickly escalating into a dangerous encounter for all involved. Chaney admits to initially getting out of his car. He also admits that he blocked Officer Cute's attempt to take the keys out of the ignition, actively resisting Officer Cute. A hostile, boisterous crowd had gathered. *Id.* at 156. During the struggle, but before Officer Cute deployed the taser, Officer Cute was only able to secure one of Chaney's wrists in the handcuffs, leaving the other handcuff dangling from Chaney's arm as a potential weapon.

Turning to the case law pertaining to the use of the taser, there is no decision that clearly

establishes that the use of a taser is unreasonable force in this present situation. The jury found that Officer Cute had a valid basis to make the traffic stop and to effect the arrest.[4] Officer Cute followed Orlando Police Department guidelines in using his taser. In fact, he could have used the taser at an earlier stage, but instead he attempted to gain Chaney's compliance without its use. *Id.* at 184.

The only Eleventh Circuit case that is analogous to the instant case is *Draper v. Reynolds*, 369 F.3d 1270, 1270 (11th Cir. 2004). At the outset, the Court notes that *Draper* was decided nearly a year after the incident in the instant case occurred, so it could not have constituted clearly established law on the date this incident occurred. *Id.* In *Draper*, the officer deployed his taser on an arrestee who was belligerent, hostile, and uncooperative. *Id.* at 1278. The Eleventh Circuit panel found that this was acceptable use of force, stating that the use of the taser probably prevented a physical confrontation, which could have resulted in serious injury for either party. *Id.* Hence, even if it had been decided before the date in question, the *Draper* case could not have given Officer Cute notice that his actions could be construed to be excessive force.

Moreover, there is no case law that clearly

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[4] The Court notes that at the summary judgment stage the Court could not rule that Officer Cute was entitled to qualified immunity based on the lack of clearly established law because an issue of fact existed at that time concerning whether there were valid grounds for either the stop or the arrest.

establishes Officer Cute's use of force to stop Chaney from communicating with the hostile crowd was unreasonable. *See Vinyard v. Wilson*, 311 F.3d 1340, 1350-51 (11th Circ. 2002), *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000) and *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997). The Eleventh Circuit, in the *Ferraro* case, dealt with the issue of whether slamming an arrestee's head on the car trunk after the arrestee was in handcuffs constituted excessive force; but the instant case is factually distinguishable. *Ferraro*, 283 F.3d at 1197. In *Ferraro*, the officer, a large man, pulled the arrestee, a short woman, over for honking her horn. *See id.* at 1190-91. The officer grabbed her wrist and roughly pulled her out of the car and handcuffed her. *Id.* at 1191. He then led her around to the trunk of the car and slammed her head on the trunk. *Id.* at 1191. She was arrested for resisting arrest with violence and failure to obey a police officer. *Id.* These charges were later dropped. *Id.* at 1192-93. The arrestee suffered both permanent physical and mental injuries from the encounter. *Id.* at 1192. She brought multiple claims against the officer and the City of Miami. *Id.* at 1193. The district court denied qualified immunity for the officer at summary judgment on the claims of false arrest and excessive force. *Id.*

On appeal, the Eleventh Circuit stated that summary judgment on the basis of qualified immunity for the excessive force claim was inappropriate in this situation. *Id.* at 1200. The court went to great lengths to demonstrate why

Ferraro was unlike the majority of instances where the Eleventh Circuit had granted qualified immunity for excessive force claims. *See id.* at 1198-1201. The court stated that honking a horn is about as insignificant a crime as exists. *Id.* at 1198. It also noted that the arrestee did not resist the arrest. *Id.* The court then pointed out that once she was secured in handcuffs the arrestee presented neither a danger to the officer nor a risk of flight. *Id.* The court affirmed the denial of summary judgment based on qualified immunity on the excessive force claim. *Id.* at 1201.

The instant case is factually distinguishable. Officer Cute had probable cause to arrest Chaney and, as already demonstrated in this order, had authority to use reasonable force in effecting that arrest. Unlike *Ferraro*, Plaintiff was resisting Officer Cute. Importantly, placing Plaintiff in handcuffs did not vitiate the danger. There was a hostile crowd, [5] with which Plaintiff was trying to communicate. Officer Cute could have reasonably believed that he needed to use force to stop Plaintiff from communicating with the crowd. Plaintiff has not alleged any permanent, or even significant, injuries. The *Ferraro* court recognizes that only in clearly egregious cases should the court deny qualified

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[5] Sergeant Klem, Officer Cute's commanding officer who arrived on the scene after Officer Cute hand-cuffed Chaney, stated that the crowd was hostile and upset. Doc. 171 at 156. Sergeant Klem elaborated further "[t]he reason I know they were upset because I heard them yelling at us, saying, 'fucking crackers, what are you to 'em. Why are you harassing 'em.'" *Id.*

immunity; qualified immunity should be granted in close cases. *See Id.* at 1200. Since *Ferraro* is distinguishable, that case did not give Officer Cute notice that his actions could constitute excessive force.

Moreover, Officer Cute's actions do not meet the narrow exception of rising to the level of obviously violating Chaney's Fourth Amendment rights. Officer Cute had probable cause to arrest Chaney and used force authorized by his police department, which– viewed through a reasonable officer standard as herein demonstrated– was not patently excessive. Therefore, Officer Cute is granted qualified immunity on the excessive force claim.

C. Defendant's Rule 50 Punitive Damages Motion[6]

Plaintiff must have a valid claim for the Plaintiff to recover damages. Since Plaintiff does not have any valid claims he is not entitled to recover damages. Alternatively, should the Eleventh Circuit disagree with this Court's liability analysis, the Court finds the punitive damages award to be constitutionally excessive.

"In our judicial system compensatory and

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[6] Officer Cute's main punitive damages argument is found in his Rule 59 Motion (Doc. 160). But since his argument goes to the constitutionality of the damages it is actually a determination of law under Rule 50. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999).

punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) (internal citation omitted).

Whereas "[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . punitive damages serve a broader function; they are aimed at deterrence and retribution. *Id.* (internal citations and quotations omitted). For this reason, there are procedural and substantive constitutional limitations on the imposition of punitive damages; namely, the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* at 1519-1520 (internal citations omitted). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 1520 (internal citations omitted).

In examining punitive damage awards to ensure that they are based upon an application of law rather than a decisionmaker's caprice, the United States Supreme Court instructs reviewing courts to consider three guideposts: (1) the difference between the punitive damages awarded by the jury and the criminal penalties[7] authorized or imposed in

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[7] Most of the case law refers to civil penalties. However, the Supreme Court has indicated that criminal penalties are

comparable cases; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the degree of reprehensibility of the defendant's misconduct. *See id.*

"It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve the punishment or deterrence." *Id.* at 1521 (internal citation omitted).

1. The Difference Between the Punitive Damages Awarded by the Jury and the Criminal Penalties Authorized or Imposed in Comparable Cases

In accordance with the Supreme Court's decision in *Campbell*, the first due process guidepost this Court will analyze is the disparity between the punitive damages awarded by the jury in this case and the criminal penalties authorized or imposed in comparable cases. The punitive damages awarded equaled $100,000. The comparable state law fines for battery range from $1,000 to $10,000. Fla. Stat. 775.083(1). The disparity between the comparable fines and the punitive damages awarded in the

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just as good of a comparison. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1603 (1996).

instant case is troubling and militates towards a reduction.

2. The Disparity Between the Actual or Potential Harm Suffered by Plaintiff and the Punitive Damages Awarded

The second guidepost is the disparity between the actual or potential harm suffered by Plaintiff in comparison to the amount of the punitive damages award. Although the Supreme Court was loath to issue a rigid formula in determining a proper punitive damages award, the *Campbell* Court declared "single digit multipliers are more likely to comport with due process." 123 S. Ct. at 1524 internal citation omitted). The Court further cautioned that "an award of more than four times the amount of compensatory damages mist be close to the line of constitutional impropriety." *Id.* (internal citation omitted). One instance where a multiplier greater than four might employed, and the award would still comport with due process, is "where a particularly egregious act has resulted in only a small amount of economic damages." *Id.*

In the instant case, the disparity between the compensatory damages and the punitive damages is disturbing. The jury awarded Plaintiff a total of $972.15 in compensatory damages and $100,000 in punitive damages. *Id.* The multiplier is a triple digit one: the punitive damages were 102.8 times greater than the actual damages. To comply with due process, the punitive damages must be reduced.

Even if this were a situation where an egregious act gave cause for awarding more than four times the compensatory damages the Court determines the highest single digit multiplier– nine times– is more appropriate in the instant case.

3. The Degree of Reprehensibility of the Defendant's Misconduct

The third and final due process guidepost is the degree of reprehensibility of the defendant's misconduct. In *Campbell*, the Supreme Court stated that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 123 S. Ct. at 1521 (internal citation omitted). In that connection, courts should consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, deceit, or mere accident.

Id. (internal citations omitted). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damage award; and the absence of all of them

renders any award suspect." *Id.*

The jury's findings are mixed on this factor. On one hand, the jury found that Officer Cute had probable cause to detain Chaney and that Officer Cute reasonably believed that Chaney was resisting arrest. On the other hand, the jury found that Officer Cute acted with malice or reckless indifference to Chaney's rights. It is difficult to conclude from the jury's findings that Officer acted with reprehensibility. Even though he was overly aggressive and forceful in arresting Chaney, Officer Cute had probable cause to arrest and a justified belief that Chaney was resisting arrest. Moreover, although the conduct in question could be argued to have involved repeated actions - two tasings and rough handling - Chaney's case unquestionably stems from one isolated incident: his arrest on June 5, 2003. It is not apparent whether this factor strongly favors either party. What is apparent is that this factor cannot be the foundation upon which this towering punitive damages award stands.

A review of the *Campbell* factors demonstrates that the punitive damages awarded in the instant case are unconstitutional. Since the compensatory damages were low and the jury did find malice on Officer Cute's part the Court finds that a multiplier of nine times the compensatory damages is a harsh but not excessive award for this case. Therefore, should the appellate court disagree with this Court's liability analysis, the proper amount of punitive damages should be $8,749.35.

D. Defendant's Motion for New Trial

Even though the Court has found for Officer Cute on his Rule 50 motion the Court must also consider Officer Cute's Motion for New Trial. The Eleventh Circuit established the following standard for a new trial:

> A judge should grant a motion for a new trial when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great-not merely the greater-weight of the evidence.

Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001) (internal citations and quotations omitted).

Officer Cute claims that he is entitled to a new trial because the jury verdict contradicts itself. The jury found that Officer Cute had probable cause to stop Chaney and that Chaney resisted Officer Cute's lawful directives and attempted arrest. Officer Cute argues that since he had probable cause to detain and

arrest Chaney that he could not have violated Plaintiff's constitutional rights. Additionally, Officer Cute made a conclusory statement that the verdict was against the clear weight of the evidence.

Officer Cute's arguments are unavailing. The authority to make an arrest permits an officer to use reasonable force; but it does not permit an officer to use excessive force. The jury found that even though Officer Cute had the authority to arrest Chaney he overstepped his bounds and used excessive force in effecting Chaney's arrest. Moreover, there was ample evidence for the jury to reach the conclusion that it did.

V. CONCLUSION

Based on the foregoing, it is **ORDERED** as follows:

1. Defendant's, Jonathan Cute, Motion to Set Aside Verdict (Doc. 158), filed March 10, 2006, is **GRANTED**.

2. Defendant's Motion for new trial or to alter or amend judgment (Doc. 160), March 10, 2006, is **DENIED**.

3. The Clerk shall enter final judgment providing that Plaintiff, Dontray Chaney, shall take nothing on his claims against the Defendant, Jonathan Cute. The judgment shall further provide that the Defendant shall recover his costs arising from this action.

4. All other Pending motions are **DENIED** as moot.

5. The Clerk shall **CLOSE** the case.

DONE and **ORDERED** in Chambers, in Orlando, Florida on August 15, 2007.

s/
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record

APPENDIX E

11TH CIRCUIT OPINION

DATED AUGUST 26, 2008

E-1

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 07-14169

District Court Docket No.
04-00515-CV-ORL-22KRS

DONTRAY CHANEY,

Plaintiff-Appellant,

versus

CITY OF ORLANDO, FL,
a municipal corporation,
JONATHAN CUTE,

Defendants-Appellees.

FILED
U.S. COURT OF
APPEALS 11th CIRCUIT
Aug 26, 2008

THOMAS K. KAHN
Clerk

Appeal from the United States District Court
for the Middle District of Florida

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 26, 2008

For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

ISSUED AS MANDATE
DEC 31 2008
U.S. COURT OF APPEALS
ATLANTA, GA.

E-3

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14169
Non-Argument Calendar

D.C. Docket No. 04-00515-CV-ORL-22KRS

DONTRAY CHANEY,

Plaintiff-Appellant,

versus

CITY OF ORLANDO, FL,
a municipal corporation,
JONATHAN CUTE,
Defendant,
Defendants-Appellee.

FILED
U.S. COURT OF
APPEALS 11th CIRCUIT
AUGUST 26, 2008

Appeal from the United States District Court
for the Middle District of Florida

(August 26, 2008)

Before BIRCH, CARNES and BARKETT, Circuit Judges.

BIRCH, Circuit Judge:

Plaintiff-appellant Dontray Chaney appeals the district court's judgment as a matter of law for defendant-appellee Jonathan Cute in Chaney's 42 U.S.C. § 1983 action. On remand, Chaney v. City of Orlando, Florida, 483 F.3d 1221 (11th Cir. 2007), the district court granted Cute's motion to set aside the jury verdict, granted Cute judgment as a matter of law on the excessive force issue finding that he was entitled to qualified immunity, reduced the awarded punitive damages, and denied Cute's motion for a new trial. Because the district court correctly concluded that the jury's verdict regarding the excessive force claim was not supported by substantial evidence and that the amount awarded for punitive damages was unconstitutional, it correctly granted Cute's judgment as a matter of law and reduced the awarded punitive damages. We AFFIRM.

I. BACKGROUND

Following a jury trial in 2006, the district court granted Cute's renewed motion for judgment as a matter of law and entered judgment for Cute and for defendant City of Orlando.[1] Id. at 1226. Cute argued in his motion for judgment as a matter of law

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[1] As we noted in Chaney, the judgment as to the City of Orlando was not initially appealed and was not disturbed on appeal. 483 F.3d 1221, 1226 n.7. It was neither addressed on remand nor appealed and will not be addressed in this opinion. R10-184, 188.

that he was entitled to qualified immunity on the excessive force claim. R9-158 at 3. Chaney appealed, and on appeal, we reversed and remanded for consideration of Cute's renewed motion for judgment as a matter of law and motion for a new trial. Chaney at 1229. We found that the district court used an improper legal analysis by placing "undue weight" on the jury's findings regarding probable cause. Id. We instructed that the district court should "limit[] its inquiry as to whether there was sufficient evidence in the record to support [the] jury's finding of excessive force and its imposition of liability" on Cute. Id. at 1228.

On remand, the district court granted Cute's motion to set aside the jury verdict. R10-184 at 1. It clarified that only the excessive force claim was considered in Cute's Federal Rule of Civil Procedure 50 motion and explained that the wrongful arrest and malicious prosecution claims were decided by the jury against Chaney. Id. at 8. The district court noted that, because both parties had stipulated that Cute was employed as a law enforcement officer by the City of Orlando, Florida Police Department and was acting within his official capacity at the time of his interaction with Chaney, the burden shifted to Chaney to establish that qualified immunity did not apply. The district court also noted that the jury found that Cute had probable cause to arrest Chaney and had also found that Cute used excessive force in that arrest. The district court concluded that Cute was entitled to qualified immunity because (a) he followed Orlando Police Department guidelines in

using his Taser during the arrest, (2) there was no clearly established law which could have provided Cute with notice that his actions could be considered as excessive force or that his use of force to prevent Chaney from communicating with the hostile crowd was unreasonable, and (c) Cute's actions did not obviously violate Chaney's Fourth Amendment rights. The district court also held that Chaney was not entitled to recover punitive damages because he did not have any valid claims.[2] Id. at 23. The district court denied Cute's motion for a new trial, holding that the jury's verdict was not contradictory and was supported by ample evidence. Chaney appeals.

II. DISCUSSION

On appeal, Chaney argues that the district court erred by reweighing the evidence and by failing to determine whether there was sufficient evidence to support the jury verdict for Chaney and for punitive damages. He contends that the district court reweighed the evidence, in consideration of the motion for judgment as a matter of law, because it had held, on summary judgment, that "no reasonable officer could have concluded that the license tag [on Chaney's vehicle] was obscured." R6-103 at 27. He claims that the jury specifically did not find that a reasonable officer would have believed that Chaney

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[2] The district court alternatively found that punitive damages were unconstitutionally excessive, and that an appropriate multiplier was 9 times the compensatory damages or $8749.35. R10-184 at 23, 27.

resisted Cute's lawful directive or that Chaney's response to his seizure by Cute would have provided Cute with probable cause to believe that he had the authority to arrest and seize Chaney. He argues that the district court erroneously inferred that Chaney actively resisted arrest when he put his hand over the ignition when Cute reached into the car, attempted to incite the crowd when he asked someone to call his mother, and struggled with Cute when Cute grabbed Chaney and pulled him out of the car. He contends that the district court erroneously inferred that the force that Cute used on Chaney was de minimis because he suffered permanent scars from the Taser barbs and needed medical treatment for his sustained injuries. He claims that the amount of force used was not objectively reasonable in light of the minimal governmental interest to be protected regarding the visible vehicle tag. He contends that we required the district court to find that there was insufficient evidence to support the jury verdict to enter judgment as a matter of law.

The issues of probable cause and qualified immunity were discussed by the parties and the court during the charge conference. Chaney did not object to the proposed instructions or to the special verdict form to be provided to the jury. See generally R14 at 167-90. On the special verdict form, the jury found that Cute reasonably believed that Chaney's vehicle tag was obstructed when he stopped Chaney and that Chaney resisted his directives and attempted arrest. Chaney, 483 F.3d at 1225. It also found, however, that Cute intentionally violated Chaney's rights

against excessive or unreasonable force during an arrest by unreasonably using force in Chaney's arrest and in tasing Chaney; that Cute acted with malice in his citation of Chaney; and that Cute's acts were the proximate or legal cause of Chaney's damages. It awarded Chaney nominal damages for medical and legal expenses, and assessed $100,000 in punitive damages against Cute for acting with malice or reckless indifference to Chaney's rights.

Although a qualified immunity defense is typically considered early in a case, the qualified immunity issue may proceed to trial if the evidence, viewed in the light most favorable to the plaintiff, indicates that there are facts that do not support a qualified immunity defense. Johnson v. Breeden, 280 F.3d 1308, 1317 (11th Cir. 2002). Through the use of special interrogatories, a jury "decides the issues of historical fact that are determinative of the qualified immunity defense." Id. at 1318. The court then has a duty and responsibility to "apply the jury's factual determinations to the law and enter a post-trial decision" on a defendant's Rule 50(a) motion regarding a qualified immunity defense. Id.

We review de novo a district court's grant of a motion for judgment as a matter of law and review the evidence in the light most favorable to the non-moving party. Johnson v. Paradise Valley Unified School Dist., 251 F.3d 1222, 1226 (9th Cir. 2001). We will uphold a jury's verdict if it is supported by substantial evidence. Id. at 1227. Evidence is substantial if it is adequate to support the jury's

conclusions even if contrary conclusions could be drawn. Id. Thus, although we review the entire record, we may not substitute our view of the evidence for that of the jury, and must accept the jury's conclusions regarding the evidence and disregard any evidence that the jury was not required to believe.

There is no indication that the district court erroneously reweighed the evidence regarding probable cause. At the time of the summary judgment motion, the district court found that the traffic stop was invalid based on the record at that time and Cute's failure to rebut Chaney's photograph of the rear vehicle as it appeared on 5 June 2003. R6-103 at 26-27. The parties subsequently submitted a pretrial statement stipulating that the issues of probable cause and qualified immunity were to be tried. R7-125 at 11.

During the trial, Cute testified that the license tag on Chaney's vehicle was not visible to him from the legally required 100 feet or even from 50 to 60 feet, and that, once he activated his lights and pulled behind Chaney's vehicle into a parking lot, he struggle[d] to see the numbers" at about 10 feet. R13 at 121-22. Cute explained that while he was calling in the tag numbers, Chaney got out of his car. Id. at 122-23. Cute said that he ordered Chaney to get back into his vehicle, but that Chaney did not comply until after Cute had drawn his Taser, again ordered Chaney to reenter his vehicle, and walked toward Chaney. Id. at 123-24. Once Chaney was back in the

driver's seat of his car with his door open, Cute asked Chaney for his license, registration, and proof of insurance. Id. at 124-25. Instead of complying with Cute's request, Chaney again attempted to exist the vehicle. Id. at 125-26. Cute said that, after he again instructed Chaney to stay in the car, Chaney 'dove . . . to the right . . . passenger floorboard . . . with both of his hands." Id. at 126-27. Cute reacted by reaching into the vehicle, grabbing Chaney's left arm, pulling him out of the car, and advising him that he was under arrest. Id. at 127-28. Cute explained that Chaney actively resisted his efforts to arrest him by tensing his arms so that Cute was unable to get them behind Chaney's back. Id. at 128-29. Cute called for additional police assistance while he attempted to maintain control of Chaney, who continued to struggle, by wrapping him in a bear hug and taking him to the ground. Id. at 129-31, 133, 134-35, 136. Once they were on the ground, Cute attempted to handcuff Chaney but was only able to get the handcuffs on Chaney's right arm. Id. at 132-35. Cute explained that he decided to deploy his Taser because he was "in fear of losing control" of Chaney. Id. at 135.

After Cute had discharged his Taser into Chaney, he ordered Chaney to stay laying on his stomach and to keep his arms out to his sides. Id. at 135-38. When Chaney did not do so but attempted to sit up, Cute discharged his Taser again. Id. at 138. After his arrest, Chaney was examined and photographed by police personnel before he was transported to the jail, and examined by the jail

medical staff and found to have an abrasion on his right check and two small punctures on his back where the Taser probes had entered. R14 at 36-38. After Chaney was released from jail, he visited the hospital for the soreness in his back and showed them the marks on his back and face. Id. at 23-24. He was treated and released, and did not receive any further medical treatment for his injuries. Id. at 23-24, 43-45. At the close of Chaney's case, Cute renewed his motions for judgment as a matter of law as to all of the issues and for a directed verdict on punitive damages; the district judge took these motions under advisement. R9-149, R14 at 187.

Chaney did not move for a directed verdict, and did not object to any of the jury instructions given by the district court or to the verdict form. In fact, Chaney expressly agreed to the jury instructions and to the verdict form. R14 at 166-187, R15 at 2-4. The jury form did not ask the jury to determine the issue of qualified immunity, but only whether or not Cute had a reasonable belief that the license tag was obscured and that Chaney resisted his lawful directives.

Although malicious prosecution is a viable constitutional tort under 42 U.S.C. § 1983, a prevailing plaintiff must show both a violation of his Fourth Amendment right to be free from an unreasonable seizure and the elements of the common law tort of malicious prosecution. Uboh v. Reno, 141 F.3d 1000, 1002-03, 1004 (11th Cir. 1998). The elements of the common law tort of malicious

prosecution are determined by a review of both federal and state law and the historical developments of those elements, but a claim based on a Fourth Amendment violation remains a federal constitutional claim that is ultimately controlled by federal law. Wood v. Kesler, 323 F.3d 872, 881, 882 (11th Cir. 2003). Based on such a review, we have held that the constituent elements of a § 1983 malicious prosecution claim include: (1) a judicial proceedings commenced against the present plaintiff by the present defendant; (2) malice and a lack of probable cause for the judicial proceeding; (3) the termination of the judicial proceeding in favor of the present plaintiff; (4) damage suffered by the present plaintiff as a result of the judicial proceeding. Id. at 882. These same elements are required under Florida law for the tort of malicious prosecution and each element must be satisfied to establish such a claim. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994).

Here Chaney can clearly establish a judicial proceeding against him as a result of the traffic citation issued by Cute (element one), the termination of the judicial proceeding in his favor (element three), and financial damages suffered as a result of the judicial proceeding against him (element four). He cannot, however, establish that Cute acted with malice or without probable cause because the jury found that Cute had a reasonable belief to make the traffic stop and that Chaney was resisting arrest. Chaney's malicious prosecution claim could not, therefore, stand.

Further, where the facts and circumstances within a law enforcement officer's knowledge caused an objectively reasonable belief that an offense was being committed, probable cause exists and "is an absolute bar to a [§] 1983 action." Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir. 1990); Durruthy v. Pastor, 351 F.3d 1080, 1088 (11th Cir. 2003). Cute did not need actual probable cause to be entitled to a qualified immunity defense, however, but only "arguable probable cause" so that "the facts and circumstances must [have] be[en] such that the officer reasonably could have believed that probable cause existed." Montoute v. Carr, 114 F.3d 181, 184 (1997) (citation omitted). The jury found that Cute reasonably believed that Chaney's license tag was obscured. The jury also found that Cute reasonably believed that Chaney resisted him during the stop. Both findings were supported by the evidence and support Cute's position that he could have reasonably believed that probable cause existed for Chaney's arrest.

The determination of whether an officer is entitled to qualified immunity is one of law to be made by the court and not submitted to a jury. Stone v. Peacock, 968 F.2d 1163, 1165 (11th Cir. 1992) (per curium). Qualified immunity shields officers from civil liability if, considering the facts in the light most favorable to the party asserting the injury, the officers' conduct does not violate clearly established constitutional or statutory rights which a reasonable officer would have known, and will be granted unless the conduct, considered in light of the law existing at

that time, was so obviously wrong that it would nto have been done except by an officer who was incompetent or in knowing violation of the law. Saucier v. Katz, 533 U.S. 194, 201, 202, 121 S. Ct. 2151, 2156 (2001); Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1280 (11 th Cir. 2002). Qualified immunity is available to an officer whose conduct is governed by a reasonable mistaken understanding of the law. Saucier, 533 U.S. at 205, 212 S. Ct. At 2158.

Once the officer establishes that his actions fell within the scope of his discretionary authority and violated no clearly established right which a reasonable officer would have known, "the burden shifts to the plaintiff to establish that qualified immunity does not apply." Storck v. City of Coral Gables, 354 F.3d 1307, 1314 (11th Cir. 2003). In a claim of excessive force, there are two ways to show that the law clearly established that the particular amount of force use was excessive. Lee v. Ferraro, 284 F.3d 1188, 1198 (11 th Cir. 2002). The first of those ways is to show that, in a materially similar factual situation, the law has held that the officer's conduct was unlawful. Id. Where the case law is not materially similar, we look to the second way and consider whether other case law has provided sufficient notice to "every" reasonable officer that such force is unlawful. Id. at 1199 (citation omitted).

Chaney is unable to show that Cute's conduct violated any clearly established right. There was no evidence at trial indicating that Cute's conduct of physically grabbing Chaney, pulling him out of his

car, throwing him to the pavement, handcuffing him, using his Taser on Chaney's back, or putting his foot on Chaney's head was so obviously wrong that he would have known that it was unlawful and Chaney has cited no case law that would have provided Cute with such notice. There was no Eleventh Circuit case law at the time of the incident which would have provided Cute with notice that use of a Taser constituted unreasonable or excessive force,[3] or notice that the use of force was unlawful to prevent Chaney from communicating with what Cute perceived to be a hostile crowd. See Jones v. City of Dothan, Ala.. 121 F.3d 1456, 1460 (11th Cir. 1997) (per curium) (officers entitled to qualified immunity where no cases "made it readily apparent" that their conduct was unconstitutional).

The facts in this case also foreclose it from the narrow exception to qualified immunity available if the plaintiff can show that the officer's conduct was so outrageous as to be unconstitutional "even without caselaw on point." Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 926 (11th Cir. 2000). Trial testimony clearly indicated that, as an officer of the Orlando Police Department, Cute was allowed, in the face of passive resistance, to use a Taser and, in the face of active resistance, higher levels of force to gain compliance from a suspect. R13 at 162-63, 183-87,

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[3] Since the incident, we have held that use of a Taser to encourage compliance or to gain control over a potentially violent situation is permissible. Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004).

193, 197-98, 204, 210, 214, 232-41.

Based on the lack of sufficient evidence supporting the jury verdict regarding excessive force, and the sufficient evidence supporting Cute's entitlement to qualified immunity, the district court correctly granted Cute judgment as a matter of law on the use of force claim.[4]

III. CONCLUSION

On remand, the district court reviewed the evidence and concluded that it was insufficient to support the jury verdict for Chaney on the excessive force claim against Cute. It found that Cute followed police procedures, that no clearly established law provided him with notice that his actions could have been considered excessive force or unreasonable, and that his actions did not violate Chaney's Fourth Amendment rights. Based on this analysis, the district court properly granted Cute's motion for judgment for judgment as a matter of law and denied Cute's motion for a new trial. The district court also struck the awarded punitive damages. We AFFIRM.

BARKETT, Circuit Judge, dissenting.

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[4] With no valid claims, the district court also correctly struck the punitive damages awarded Chaney.

E-17

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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www.ca11.uscourts.gov

December 31, 2008

Sheryl L. Loesch
Clerk, U.S. District Court
401 W CENTRAL BLVD STE 1-200
Orlando FL 32801-0120

Appeal Number: 07-14169-DD
Case Style: Dontray Chaney v. City of Orlando, FL
District Court Number: 04-00515 CV-ORL-22KRS

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

The clerk of the court or agency shown above is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14169-DD

DONTRAY CHANEY,
Plaintiff-Appellant,
versus
CITY OF ORLANDO, FL,
a municipal corporation,
Defendant,
JONATHAN CUTE,
Defendant-Appellee.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DECEMBER 19, 2008
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Before: BIRCH, CARNES and BARKETT, Circuit Judges

PER CURIUM:

The Petitions for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En

Banc are DENIED.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX G

NOLLE PROSEQUI BY STATE ATTORNEY

DATED JULY 15, 2003

G-1

IN THE COUNTY COURT FOR ORANGE COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

vs.

DONTRAY RASHI CHANEY,

Defendant.
_____/

CASE NUMBER: 48-2003-MM-008414-O
ARREST DATE: 06/05/03
OFFICER: Jonathan Cute
AGENCY/NUMBER: ORPD, 03-212643
DATE: July 15, 2003

CHARGE(S): 1. RESISTING OFFICER WITHOUT VIOLENCE

NO INFORMATION NOTICE

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney and states that:

1. From the investigation which has been made, it is the opinion of the writer that this case is not suitable for prosecution.

2. This action is taken to clear the records and to release subject's bond if any has been posted responsive to the above charge(s). If in custody, defendant should be released PROVIDED THERE ARE NO OTHER

CHARGES OR HOLDS AGAINST HIM.

Lawson Lamar, State Attorney
Ninth Judicial Circuit of Florida

By: s/_____
Esther Whitehead
Assistant State Attorney
Florida Bar No.
415 N. Orange Ave., PO Box 1673
Orlando, FL 32801
(407) 836-2400

STATE OF FLORIDA COUNTY OF ORANGE I HEREBY CERTIFY that the above and foregoing is a true copy of the original filed in this office.

LYDIA GARDNER, Clerk Circuit Court

Dated 9/12/05 By: s/_____